AGREED RECORD

SUPREME COURT OF THE UNITED

No. [illegible] ORIGINAL

THE STATE OF SOUTH DAKOTA, COMPLAINANT

vs.

THE STATE OF NORTH CAROLINA, CHARLES
AND SIMON ROTHSCHILD

BILL IN EQUITY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 9, ORIGINAL.

THE STATE OF SOUTH DAKOTA, COMPLAINANT,

vs.

THE STATE OF NORTH CAROLINA, CHARLES SALTER, AND SIMON ROTHSCHILDS.

BILL IN EQUITY.

INDEX.

	Original.	Print.
Motion for leave to file bill of complaint	1	1
Order granting leave to file bill of complaint	2	1
Bill of complaint	3	2
Exhibit A—Copy of bond and coupon	17	10
B—An act to enhance the value of the bonds to be issued for the completion of the Western North Carolina Railroad, December 18, 1866	19	11
C—Notice of commissioners appointed under act of March 14, 1879	21	12
Answer of the State of North Carolina	26	15
Exhibit A—An act to adjust and renew a portion of the State debt, March 14, 1879	38	22
Answer of Charles Salter	43	25
Replication to answer of State of North Carolina	49	28
Order to take testimony	50	29
Stipulation to take depositions	51	29
Stipulation to appoint E. S. Battle commissioner	52	30
Deposition taken before I. W. Goodner, commissioner	53	30
Stipulation to take depositions	53	31
Testimony of Charles N. Herreid	55	32

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	Original.	Print
Exhibit No. 1—Reproduction of bond and coupons	67	39
Memorandum as to Exhibits Nos. 2 to 10	68	39
Exhibit No. 11—Letter of Simon Schafer to Charles H. Burke, September 10, 1901	69	39
No. 12—Act to require the acceptance and collection of grants, &c., March 11, 1901	71	40
Commissioner's certificate	74	41
Depositions taken before Russell Lucas, commissioner	76	42
Testimony of William Henry Gibson	77	43
Simon Rothschild	94	53
Charles Salter	104	59
Simon Rothschild (recalled)	111	64
Samuel M. Schafer	112	65
Bond and coupon	133	77
Commissioner's certificate	136	78
Stipulation to take depositions	138	79
Depositions taken before Edward S. Battle, commissioner	142	80
Testimony of Miles Osborne Sherrill	143	81
Kemp Plummer Battle	147	83
Charles B. Aycock	165	93
Dr. J. J. Mott	166	94
H. C. Cowles	173	98
Daniel L. Russell	182	102
Fabius H. Busbee	196	110
William H. Worth	202	114
Commissioner's certificate	203	114
Order to take testimony	204	115
Stipulation to appoint commissioner	206	116
Exhibit A—Laws of 1854-'55, chapter 228, Act to incorporate the Western North Carolina R. R. Co.	208	116
B—Laws of 1866-'67, chapter 106, Act to enhance the value of the bonds to be issued for the completion of the Western North Carolina R. R.	229	127
C—Laws of 1879, chapter 138, Act to adjust and renew a portion of the State debt	232	129
D—Laws of 1879, chapter 98, Act to compromise, commute, and settle the State debt	237	131
E—Laws of 1848-'49, chapter 82, Act to incorporate the North Carolina R. R. Co	244	135
F—Laws of 1854-'55, chapter 32, Act for the completion of the North Carolina R. R	271	149
G—Petition addressed to the General Assembly of North Carolina by certain holders of North Carolina bonds issued in aid of the W. N. C. R. R.	274	151
Exhibit A—Schedule of bonds, &c	288	159
B—Bond and coupon	298	164
C—Notice of commissioners	300	165
H—Statement of State treasurer as to certain bonds	306	169
G—Chapter 98, Laws of 1866-'67, Act to authorize the president and directors of the Western North Carolina R. R. Co. to put said road under contract	308	170

	Original.	Print
Depositions taken before A. D. Watts, commissioner	311	172
Notice to take testimony	311	172
Testimony of Charles H. Burke	313	173
Marion Butler	324	179
Commissioner's certificate	331	183
Order fixing day for hearing	333	184
Motion for leave to file stipulation concerning printing of record, &c.	334	184
Stipulation as to printing record	335	184

1 Supreme Court of the United States.

STATE OF SOUTH DAKOTA
against
STATE OF NORTH CAROLINA ET AL.

Comes now the State of South Dakota, by its attorney general, and moves for leave to file the annexed bill of complaint of the State of South Dakota against the State of North Carolina, Charles Salter and Simon Rothschilds and that due process of subpœna issue thereon according to the practice of this court.

Oct. 7, 1901.

JOHN L. PYLE,
Attorney General of South Dakota.
ROBERT W. STEWART,
Solicitor for Plaintiff.

WHEELER H. PECKHAM,
Of Counsel for Complainant.

Endorsed: Supreme Court U. S. October term, 1901. Term No. 11, original. The State of South Dakota *vs.* The State of North Carolina, *et al.* Motion for leave to file bill of complaint. Filed Nov. 11, 1901.

2 Supreme Court of the United States, October Term, 1901.

THE STATE OF SOUTH DAKOTA, Complainant,
vs.
THE STATE OF NORTH CAROLINA, CHARLES Salter, and Simon Rothschilds.
No. 11, Original.

On consideration of the motion for leave to file a bill in equity herein,

It is now here ordered by the court that said motion be, and the same is hereby, granted, and that subpœnas returnable on Monday, March 3d, 1902, be issued and served herein.

Per MR. CHIEF JUSTICE FULLER.

November 18, 1901.

Endorsed: Supreme Court U. S. No. 11, orig'l. October term, 1901. Order Filed Nov. 18 1901.

3 In the Supreme Court of the United States, October Term, 1901. In Equity.

THE STATE OF SOUTH DAKOTA, Complainant,
vs.
THE STATE OF NORTH CAROLINA, CHARLES SALTER, and SIMON ROTHSCHILDS, Defendants. } No. 11, Original.

To the honorable the Supreme Court of the United States:

The State of South Dakota by John L. Pyle the attorney general thereof, brings this, its bill against the State of North Carolina, and Simon Rothschilds, a citizen of the State of New York, and Charles Salter, a citizen of the State of New York.

And thereupon your orator complains and says:

I.

4 That your orator is the holder and owner in its own right, and is in the actual possession of ten certain writings obligatory or bonds with coupons thereto attached, which bonds were issued by the defendant, The State of North Carolina, for the benefit of a certain railroad known by its corporate name as the Western North Carolina Railroad Company, which said bonds the said defendant duly executed and sealed with its seal—all of which ten bonds with the coupons to them attached are now shown unto this court. Each and every one of said bonds is dated July 1, 1867, is of the par or principal of one thousand dollars ($1,000) and has matured and become due on the first day of July, 1897, and has to it attached semi-annual coupons which fell due from January 1, 1869, to July 1, 1897, inclusive, each of said coupons calling for the sum of thirty dollars ($30) being at the rate of six per centum per annum on said principal. A copy of one of said bonds is hereto attached as a part of this bill of complaint, marked Exhibit "A."

II.

That said bonds were issued under and by virtue of an act of the General Assembly of North Carolina entitled "An act to incorporate the Western North Carolina Railroad Company," ratified the 15th day of February, 1855, being chapter 228 of the Acts of 1854–'55, and of an act amendatory thereof, to wit, chapter 106 of the Laws of 1866–'67, ratified the nineteenth day of December, 1866, entitled, "An act to enhance the value of the bonds to be issued for the completion of the Western North Carolina railroad and for other purposes," a copy of which said act of 1866 is hereto attached as a part of this bill of complaint, marked Exhibit "B."

5 III.

That at the time of the passage of the said act of 1866, the defendant, The State of North Carolina, was owner (subject to the statutory

lien or mortgage hereinafter set out and to be designated as the "first mortgage") of thirty thousand shares of stock in the North Carolina Railroad Company of the par value of three million dollars (shares one hundred dollars par) and said act of 1866 directed the State treasurer to mortgage for the security of the bonds held by your orator and of all other bonds of the same issue—that is, issued after the passage of the act of 1866 by authority of the act of 1855 aforesaid—such an amount of the stock owned by the State in the North Carolina Railroad Company as should equal in its par, the principal or par of the State bonds to be issued after the act of 1866 in aid of the Western North Carolina Railroad Company by authority of said act of 1855, which act of 1855 was the incorporation or charter of the Western North Carolina Railroad Company; and said act of 1866 declared that said mortgage should have the force and effect, in law and equity, of registered mortgages without actual registry; and in execution of said act of 1866 the treasurer of the State and the State comptroller certified upon each and all of the said bonds authorized by the act of 1855 and issued after the act of 1866, including the bonds now held and owned by your orator, the following endorsement:

"STATE OF NORTH CAROLINA,
"TREASURY DEPARTMENT,
"RALEIGH, *July* 1, 1867.

"Under the provisions of an act of the General Assembly of North Carolina, entitled 'An act to enhance the value of the bonds
6 to be issued for the completion of the Western North Carolina Railroad Company, and for other purposes,' ratified 19th December, 1866, ten shares of the stock in the North Carolina Railroad Company, originally subscribed for by the State, are hereby mortgaged as collateral security for the payment of this bond.

"Witness the signature of the public treasurer and seal of office, and the counter-signature of the comptroller.

"KEMP P. BATTLE,
"*Public Treasurer.*

"S. W. BURGIN, *Comptroller.*"

IV.

That in 1849 the State of North Carolina incorporated and chartered the North Carolina Railroad Company by an act of its General Assembly, being chapter 82, Acts of 1848–'49, by which act it was provided that the capital stock of said company should be three millions of dollars, of which two millions was to be subscribed by the State and one million by private parties, all of which said subscriptions were duly made and paid into the treasury of the North Carolina Railroad Company; and afterwards, to wit, in 1855, by virtue of the Laws of 1854–'55, chapter 32, section 1, the State subscribed and paid in an additional one million of dollars for an equal amount of said stock, so that the State became and has without interruption continued to be, and is now, the owner of thirty thousand shares

($3,000,000 par) out of forty thousand shares ($4,000,000 par) of stock of said North Carolina Railroad Company; that in order to raise money for the payment of its three-million subscription as aforesaid, it was provided by both of the acts last mentioned that the State should issue its six per cent. bonds for three million dollars, running and to be due in thirty years from their date, and by authority of said acts the bonds of the State were duly issued and sold. And it was further provided by said acts that all of said stocks held and owned by the State (thirty thousand shares—three million dollars par) should be pledged as security for this three millions of bonds, by authority of which statutory lien or mortgage, the holders of said three millions of bonds acquired a first mortgage on all of the State's stock—(thirty thousand shares—three million dollars par)—in said North Carolina Railroad Company. Said bonds are designated in this bill of complaint as first-mortgage bonds.

7

V.

Your orator is advised and believes and so avers that the effect of the legislation and action of the defendant, The State of North Carolina, above recited was to give to the first-mortgage bondholders a lien or pledge or mortgage on all the State stock in the North Carolina Railroad Company, and to give to your orator and the other holders of the bonds which were issued in aid of the Western North Carolina railroad after the passage of the act of 1866 a second mortgage or equitable lien upon such an amount of the said stock as should equal in its par the principal or par of said second-mortgage bonds.

VI.

That the first-mortgage bonds, having been issued from time to time in the years between 1849 and 1853 and running at thirty years, were to fall due between the years of 1879 and 1888. And in 1879 the defendant, The State of North Carolina, through its General Assembly, passed an act entitled "An act to adjust and renew a portion of the State's debt" (Acts of 1879, chapter 138), which act is made a part of this bill as if fully and at large set forth; that under said act of 1879 commissioners were appointed who negotiated with the holders of the first-mortgage bonds, and agreed upon a settlement and compromise with the said bondholders, as by said act authorized and directed. By the terms of the said compromise the public treasurer was directed to issue bonds of the State, dated April 1st, 1879, payable forty years after date, bearing interest at the rate of six per centum per annum; that by section eight of the said act it was provided that these new bonds should in all respects stand in the place of and be entitled to the same securities as were the bonds originally issued, under the Acts of 1848–'49 and 1854–'55, above recited, and it was provided that the new bonds should have the same lien upon the stock of the State in the North Carolina Railroad Company as the bonds originally issued under said act; and it was also provided by said compromise, in substance, that the new bonds were not to be in payment, nor discharge, nor

8

extinguishment, but in renewal and extension of the old bonds and without prejudice to the lien of the said old bonds on the State's stock, which lien, was by said compromise agreement declared to be preserved unimpaired for the security of the new bonds as fully as the old bonds were secured thereby. But notwithstanding this provision written in said compromise agreement, the old bonds, as a matter of fact, and strictly in accordance with said compromise agreement, were surrendered by their holders and delivered up to the defendant, The State of North
9 Carolina, the obligor of said bonds, and were discharged and cancelled in exchange for other bonds of the same obligor, the defendant State, which were in substance and in form, new bonds of the State dated April 1st, 1879, and to become due, April 1st, 1919, and the said new bonds so issued, as your orator is informed and believes and so alleges, did not at all correspond as to their total amount, including their coupons, with the total amount of the old bonds, including coupons that were surrendered and cancelled. And there was no substitution of bonds and coupons for an equal amount of bonds and coupons, but on the contrary there was a surrender and cancellation of the whole issue of old bonds with coupons by their holders, and an acceptance by them of new promises for a different amount.

VII.

The terms of the compromise agreement between the defendant, The State of North Carolina, and the holders of the first mortgage bonds, are set forth in a statement, a copy of which is hereto appended, and made a copy of this bill, marked Exhibit "C."

VIII.

Your orator is advised and believes and so avers that neither your orator nor its assignors, nor any prior holders of bonds herein declared on, nor any other of the holders of the second-mortgage bonds, were parties to or consented to the so-called extension of the first-mortgage bonds. And if the compromise agreement, Exhibit "C" was not a discharge and extinguishment of the first-mortgage bonds, but was simply an extension of the time of their maturity, then such extension, in so far as it affects the holders of the second-
10 mortgage bonds, was and is unlawful and void in that it extends the maturity of the first mortgage without the consent of the second mortgagees who took their mortgage long before such attempted extension, and who by their second mortgage, executed by the act of 1866, acquired the vested right to pay off and discharge the first mortgage, according to its terms as it then existed. And your orator is further advised and believes and so alleges, that if the compromise agreement, Exhibit "C," was not an extension, but was an extinguishment of the first mortgage, then the second mortgage held by your orator and the other holders of the same issue of bonds became and is now a first mortgage on the stock owned by the State in the North Carolina Railroad Company

to an amount of the par of said stock equal to the principal or par of said bonds now outstanding.

IX.

That the defendant, The State of North Carolina, by its act of 1879, chapter 138 (its compromise debt law) offered for the second-mortgage bonds twenty-five per cent. on their principal which was equivalent to only about fifteen per cent. of the amount then due on them; and this was an offer, not to pay the fifteen per cent. in cash, but in a new four per cent. bond of the State. And the defendant State has refused, and does now refuse, to pay the second-mortgage bonds or to offer any fair or reasonable compromise of the same, although the market value of its stock in the North Carolina railroad is about five million dollars, while the amount of the first mortgage is now only two million seven hundred and twenty thousand dollars ($2,720,000). The amount of the second-mortgage bonds now outstanding is about two hundred and fifty thousand dollars, but can only be ascertained with
11 certainty by such orders and processes of this court as may require by publication the holders of all said bonds to produce and prove them before a master of this court. The books of the treasurer of the defendant State are inconsistent and contradictory and confused as to the amount of such bonds now outstanding. The defendant State refuses to pay anything on the second-mortgage bonds except its offer of twenty-five per cent. of their principal which is some ten or eleven per cent. of the amount which is honestly and rightfully due.

X.

That during some twenty years after the so-called extension of the first-mortgage bonds by the agreement of 1880 (Exhibit "C"), the defendant State has been annually receiving dividends on its stock amounting to one hundred and eighty thousand — a year ($180,000), while the annual interest on the first-mortgage bonds has amounted only to the sum of one hundred and sixty-three thousand, two hundred dollars ($163,200), thus leaving an excess of sixteen thousand, eight hundred dollars ($16,800) per annum for the period of twenty years, making a total of three hundred and thirty-six thousand dollars ($336,000), which has been conveyed into the general fund of the State treasury and has been used for the ordinary expenses of the State. And the State is now receiving dividends on its stock, paid semi-annually at the rate of two hundred and ten thousand dollars ($210,000) a year, while the annual interest on the first-mortgage bonds is one hundred and sixty-three thousand, two hundred dollars ($163,200) a year, thus showing forty-six thousand, eight hundred dollars ($46,800) a year in excess of
the interest on the first-mortgage bonds, which forty-six
12 thousand, eight hundred dollars ($46,800) the defendant State refuses to pay over to the second mortgagees, notwithstanding their manifest rights to this fund on the facts hereinbefore recited.

XI.

That the defendant Charles Salter is a citizen of the State of New York, and the defendant Simon Rothschilds is a citizen of the State of New York.

XII.

That the defendant Simon Rothschilds is one of the holders and owners of the bonds hereinbefore described and designated as the first-mortgage bonds. Your orator is advised and believes and so alleges, that your orator is entitled to pay off and discharge the first-mortgage bonds, notwithstanding the so-called extension of 1880, and to this end to have a decree for a sale of the thirty thousand shares mortgaged or pledged as aforesaid, or for a sale of so many shares thereof as may be required to pay off and discharge the first and second mortgages. And to this your orator is entitled, as it is advised, whether or not the first mortgage shall be held in law to have continued to be a first mortgage after the so-called extension of 1880. That the holders of the first-mortgage bonds are very numerous, and it is impracticable for your orator to bring them before this court as defendants by the ordinary process of subpœna; that the interest of the defendant, Simon Rothschilds, is identical with all his associate holders of the first-mortgage bonds and he is made a party to this bill in order that he may defend for himself and for the benefit of all who have a general and common interest in the matters to be determined.

13 XIII.

That the defendant Charles Salter is one of the holders of the second-mortgage bonds, and your orator is advised that the rights of your orator cannot be fully administered without the presence before this court of the holders of the second-mortgage bonds. And the holders of the said second *second* mortgage bonds are very numerous and it is impracticable to bring them all before this court by personal service of subpœna, and he is made a party to this bill that he may defend for the benefit of himself and all his associate second-mortgage bondholders, the matters to be herein determined being of interest, general and common, to all of said bondholders.

XIV.

That your orator obtained title to the bonds herein declared on by assignment of Simon Schafer who is a resident and citizen of the State of New York, and whose place of business is thirty-five Wall street, in the city of New York. The said Schafer transferred, assigned and delivered to your orator the said bonds as an out-and-out donation to the State of South Dakota, with the request that the proceeds of said bonds, whether derived by sale, compromise or collection, should be applied by the said State for the benefit of its university; that said donation was accepted by the governor of the State of South Dakota in pursuance of its laws, and the said bonds are held by your orator as the absolute and unconditional owner

thereof without any obligation, understanding or agreement whatever between your orator and the said Simon Schafer, or between your orator and any other person or party, and the donation so
14 made by the said Simon Schafer was without any reservation, expressed or implied, for his benefit or for the benefit of any other person. And the acceptance of the donation by the State of South Dakota was absolute and unconditional, without any agreement, expressed or implied, that the bonds or their proceeds should be applied according to the request of said donor, but on the contrary, the bonds are the absolute property of the State to be used and applied as the State may determine.

To the end, therefore, that your orator may have that relief which it can only obtain in a court of equity, and that the said defendants may answer the premises, but not upon oath or affirmation, the benefit whereof is expressly waived by your orator, it now prays the court:

1. That an account may be taken by or under the direction of this court, ascertaining the number and amounts of the bonds hereinbefore described and designated as first-mortgage bonds and second-mortgage bonds, together with the coupons to them attached and that publication be made requiring all holders of said bonds to prove them before a master of this court.

2. That the defendant, The State of North Carolina, shall pay unto the plaintiff the money which shall be found due on the ten bonds with coupons attached, set up and described in this bill of complaint; and that said payment in discharge of said bonds and coupons shall be made on or before a short day to be appointed for that purpose by this court.

3. That in default of the payment of the bonds and coupons on or before the short day named by this court, the defendant, The State of North Carolina, and all persons claiming or to claim by, from or under said defendant, may be absolutely barred and
15 foreclosed of or from all right and equity of redemption of, in and to the thirty thousand shares of stock described in this bill as being held and owned by the defendant, The State of North Carolina, and every part thereof, or of such number of shares of stock as may be directed by this court to be sold.

4. That the thirty thousand shares of stock of the North Carolina Railroad Company held and owned by the defendant, The State of North Carolina, and fully described in this bill of complaint, or so many shares thereof as may be necessary to pay off and discharge the two mortgages described in this bill and designated respectively as the first mortgage and the second mortgage may be sold under the direction of this court.

5. That the proceeds of the sale of the stock as may be made under the direction of this court shall be applied in due course and order; that is to say: First, to the payment of the necessary cost and allowances and expenses of this suit. Second, to the payment of the bonds and coupons secured by that one of the two mortgages, hereinbefore described, which this court may determine to be the

prior encumbrance. Third, to the payment of the bonds and coupons secured by that one of the two mortgages designated by this bill which may be determined by this court to be the junior or inferior encumbrance. Fourth, to the defendant, The State of North Carolina, such sum of money derived from such sale as may remain after and over and above the applications aforesaid.

6. That during the pendency of this suit a receiver be appointed to take into his possession the thirty thousand shares of stock of the North Carolina Railroad Company held and owned by the defendant, The State of North Carolina, and to collect all dividends
16 which shall accrue or become due on said stock, and to hold and disburse the same under the direction of this court.

7. For an injunction pending this suit prohibiting and enjoining the defendant, The State of North Carolina, from collecting or receiving any dividends derived from said thirty thousand shares of stock or any part thereof, and from collecting and receiving as the owner and holder of said thirty thousand shares of stock any moneys whatever accruing to said defendant, in that behalf, and commanding the said defendant, The State of North Carolina, to deliver to the receiver appointed by this court the certificate or certificates of stock held by said State in the North Carolina Railroad Company and commanding it to endorse the same in accordance with the charter, rules and by-laws of said corporation, the North Carolina Railroad Company, to the end that said receiver may have the said stock duly transferred to him on the books of said corporation, the North Carolina Railroad Company.

8. And that your orator may have all such other and further relief in the premises as the facts and circumstances and the nature of the case may require and to which it may be entitled in equity and good conscience.

May it please your honors to grant to your orators a writ of subpœna, to be directed to the said defendants, The State of North Carolina and the said Simon Rothschilds and the said Charles Salter, thereby commanding them at a certain time and under a certain penalty therein to be limited, personally to appear before this honorable court and then and there full, true, direct, and perfect answer make to all and singular the premises, and to
17 stand, perform and abide by such order, direction, and decree as may be made against them in the premises, as shall seem meet and agreeable to equity.

And your orator will ever pray.

JOHN L. PYLE,
Attorney General of South Dakota.
ROBERT W. STEWART,
Solicitor for Complainant.
WHEELER H. PECKHAM,
Of Counsel for Complainant.

EXHIBIT "A."

No. 4246.

UNITED STATES OF AMERICA:

(This certificate of debt is not subject to taxation for any purpose whatever.)

It is hereby certified that the State of North Carolina justly owes to —— —— or bearer, one thousand dollars, redeemable in good and lawful money of the United States at the National Bank of the Republic in the city of New York on the 1st day of July, 1897, with interest thereon at the rate of 6 per cent. per annum, payable half yearly at the said bank on the 1st days of January and July in each year from the date of this bond and until the principal be paid on surrendering the proper coupon hereto annexed.

In witness whereof, the treasurer of the said State, in virtue
18 of power conferred by law, hath signed this bond, and caused the seal of his office to be hereto affixed, and her comptroller hath countersigned the same at the seat of government of the said State, this 1st day of July, 1867.

KEMP P. BATTLE,
Public Treasurer.

Countersigned:
S. W. BURGIN, *Comptroller.*

(Issued by authority of an act of the legislature of North Carolina to incorporate the Western North Carolina Railroad Company, chapter 228.)

Coupon.

The State of North Carolina will pay to bearer at the National Bank of the Republic, in the city of New York, on the 1st day of January, 1869, thirty dollars on bond 4246 for $1,000.

$30. KEMP P. BATTLE,
Public Treasurer.

And the said bond contains the following indorsement on the back thereof:

STATE OF NORTH CAROLINA,
TREASURY DEPARTMENT,
RALEIGH, *July* 1, 1867.

Under the provisions of an act of the General Assembly of North Carolina, entitled, "Act to enhance the value of the bonds to be issued for the completion of the Western North Carolina Railroad Company and for other purposes," ratified 19th December, 1866, ten shares of the stock in the North Carolina Railroad Company originally subscribed for by the State, are hereby mortgaged as collateral security for the payment of this bond.

Witness the signature of the public treasurer and seal of office, and the counter-signature of the comptroller.

KEMP P. BATTLE,
Public Treasurer.

S. W. BURGIN, *Comptroller.*

19 EXHIBIT "B."

"An act to enhance the value of the bonds to be issued for the completion of the Western North Carolina railroad, and for other purposes.

"Whereas, the legislature of North Carolina, at its session of 1854–'55, passed an act entitled, 'An act to incorporate the Western North Carolina Railroad Company,' and at its session of 1860–'61, an act entitled, 'An act to amend the charter of the Western North Carolina Railroad Company;' and

"Whereas, by the combined force of said acts, the faith of the State of North Carolina was pledged for the payment of four millions of dollars in bonds of the State, a portion of which have already been issued; and

"Whereas, it is manifestly the interest of the people of the whole State that the residue of the bonds, when issued, shall command a high price in the market; therefore,

"SECTION 1. Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by authority of the same, That the public treasurer be and he is hereby authorized and directed, whenever it shall become his duty under the provisions of said acts, passed at the sessions of 1854–'55 and 1860–'61, to issue bonds of the State to the amount of fifty thousand dollars or more, to mortgage an equal amount of stock which the State now holds in the North Carolina railroad, as collateral security for the payment of said bonds, and to execute and deliver, with each several bond a deed of mortgage for an equal amount of stock *to* (of) said North Carolina railroad, said mortgage to be signed by the
20 treasurer and countersigned by the comptroller, to constitute a part of said bond, and to be transferable in like manner with it, as provided in the charter of said Western North Carolina Railroad Company; and further, that such mortgage shall have all the force and effect, in law and equity, of registered mortgages without actual registry.

"SEC. 2. Be it further enacted, That the president and directors of said Western North Carolina Railroad Company be and are hereby, authorized and empowered to issue bonds of the company, running for such term of years as they may deem expedient, and bearing interest at a rate not greater than 8 per cent. per annum, and to make, execute and deliver a deed or deeds of mortgage, conveying the whole or a portion of the right, title and interest of the company, in any or all the estate, both real and personal, belonging to said company, or in any manner pertaining to the same, to the purchaser or

purchasers of said bonds of the company, and conditioned for securing the payment of said bonds at maturity; and also to pledge the profits of said company, or so much thereof as may be necessary, for the payment of interest on said bonds as it falls due; and said bonds shall be issued by said president and directors, whenever it shall appear to them necessary, for the completion of said road, to raise funds in addition to the State's subscription; and the proceeds arising from the sale of said bonds shall be applied for the purpose of finishing the road to its western termini.

"SEC. 3. Be it further enacted, That this act shall be in force from and after its ratification.

"Ratified the 18th day of December, A. D. 1866."

21 EXHIBIT "C."

RALEIGH, N. C., ——, 1886.

The commissioners appointed under the act of 14th of March, 1879, to adjust and renew that portion of the State debt incurred to aid in the construction of the North Carolina railroad, announce that they are prepared to execute the act according to the terms of the following agreement, which has been subscribed to by the holders of a very large amount of the bonds:

"1. Whereas, under an act of the General Assembly of North Carolina, ratified on the 14th day of March, A. D. 1879, entitled 'An act to adjust and renew a portion of the State debt,' the governor of said State was authorized to appoint three commissioners to carry said act into execution, by the exchange of bonds therein mentioned for new bonds, to be issued by the said State under the provisions of the said act; and whereas, George Davis, Montford McGehee and Donald W. Bain have been appointed by the governor of the said State commissioners for the purposes mentioned in said act. Now, therefore, we, the undersigned, holders of bonds of the said State in said act mentioned and described, do hereby severally, and not jointly, propose and agree to and with the said George Davis, Montford McGehee and Donald W. Bain, to exchange with them, as commissioners as aforesaid, all of the said bonds owned, held and controlled by us, in the following terms, viz:

"2. We are to deliver said bonds to said commissioners, with coupons attached thereto, falling due on the 1st day of July, 1878, or on the 1st day of October, 1878, as the case may be, and all coupons falling due subsequent to that date. In case any of said
22 coupons have been detached from said bonds and are not delivered therewith, the amount of such detached coupons shall be noted on the certificate of the commissioners, and in the issuing of the new bonds the treasurer shall cut off from them and retain the first maturing coupons for thirty dollars, to the amount of the missing coupons, and shall deliver the coupons so cut off to the holders of the said old missing coupons, in exchange therefor, whenever the same shall be presented. The balance due on coupons of said bonds due anterior to the 1st day of July, 1878, is to be paid

without interest out of the balance of dividends on the stock owned by the State in the North Carolina Railroad Company, not heretofore distributed in the suit known as the Swasey suit (hereinafter mentioned); and if that is not sufficient for that purpose, then out of the surplus of the dividends on the stock owned by the State in the said railroad company, which shall not be applied to the payment of the interest on the new State bonds to be issued under the said act.

"3. In exchange for the bonds thus delivered by us we are to receive new bonds equal in amount to the principal of the bonds delivered by us to said commissioners, which shall be issued by the said State in all respects in accordance with the provisions of the act above referred to, with semi-annual coupons attached thereto for interest of thirty dollars each, the first of which shall become due and *and* payable on the 1st day of October, 1882, except that the first coupon of the new bonds issued in renewal of the old January and July bonds shall be for forty-five dollars instead of thirty dollars, so that the interest on each class of bonds may be equalized, it being the intention of this contract that the bondholders shall rebate to the State two hundred and forty dollars of interest on each bond delivered for renewal.

23 "4. The surplus of the dividends received under said act on the stock owned by the State in the North Carolina Railroad Company, and applicable to the said old bonds after paying the interest on the said new bonds, shall remain as and constitute a sinking fund for the payment of the interest due before the first day of July, 1878, on such of the said old bonds as have not been presented and proved in the suit known as the Swasey suit, now pending in the United States circuit court for the eastern district of North Carolina; and after such interest is paid, then for the payment of interest and principal of said new bonds issued under said act, and shall be sacredly held and applied to this purpose and none other; and such surplus shall be invested in the purchase of the new 4 per cent. bonds of the said State; and all of the bonds thus purchased shall be stamped and marked as the sinking fund for that purpose.

"5. The certificate for the stock owned by the State in the North Carolina Railroad Company shall be held by the public treasurer, after the same shall have been returned to the State by order of the court in the said Swasey suit until the said new bonds are paid in full, and no lien, mortgage or other incumbrance shall be placed or made on the said stock, or by the said railroad company, which shall have a priority over the lien of said bonds on said stock.

"6. And it is understood and is hereby expressly declared to be the true intent and meaning of this agreement that the new bonds to be issued hereunder are given, not in payment, but in renewal and extension only of the old bonds, and without prejudice to the lien of the said old bonds on the State's stock in the North Carolina Railroad Company, which lien is preserved unimpaired for the security of the new bonds as fully as the old bonds are now secured thereby."

24 "The undersigned commissioners for the State of North Carolina, appointed under and by virtue of the act of the 14th March, 1879, entitled, 'An act to adjust and renew a portion of the State debt,' do hereby, in behalf of the said State, approve, ratify and adopt the annexed and foregoing agreement and contract.

"GEO. DAVIS,
"M. McGEHEE,
"D. W. BAIN,
" *Commissioners.*"

"EXECUTIVE AND TREASURER'S OFFICE,
"RALEIGH, *June* 14, 1882.

"We, the undersigned, governor and treasurer of North Carolina, having examined the plan of adjustment of that part of the State debt contracted for the construction of the North Carolina railroad, as set forth in the foregoing contract, do hereby approve the same and do fully authorize, so far as we are empowered to do, the commissioners to proceed with the settlement as set forth in said contract.

"THOMAS J. JARVIS, *Governor.*

"J. M. WORT–,
" *Public Treasurer.*"

By the terms of the agreement the old bonds are to be delivered to the commissioners, with coupons attached, falling due July 1, 1878, or October 1, 1878, inclusive, as the case may be, and all coupons falling due subsequent to that date.

The commissioners will, as required by the act, issue to each person delivering the old bonds a certificate setting forth the number and amount of new bonds to which he may be entitled in renewal thereof. Upon the presentation of the certificate to the treasurer of State, he will deliver to the owner *of* the new bonds, with
25 coupons attached, from October 1, 1882, inclusive, subject to the provisions of paragraph 2 of the contract.

The new bonds run forty years.

The commission of one-half of one per cent. ($5 per bond), which the commissioners are to receive under the act, is upon the face of the bond, the same to be paid when the bonds and coupons are delivered to the commissioners.

The commissioners are prepared to issue the certificates, and the State treasurer will issue the new bonds.

Packages of bonds transmitted by express should be addressed to C. M. Busbee, secretary of the commission, at Raleigh, charges prepaid, and bonds presented by the holders in person will be received by him at the office of the State treasurer.

GEORGE DAVIS,
MONTFORD McGEHEE,
CHARLES M. BUSBEE,
Commissioners.

(Endorsed :) Supreme Court U. S., October term, 1901. Term No. 11, original. The State of South Dakota, complainant, *vs.* The State of North Carolina *et al.* Bill of complaint. Filed Nov. 18, 1901.

26 In the Supreme Court of the United States, October Term, 1901. In Equity.

THE STATE OF SOUTH DAKOTA, Complainant,
vs.
THE STATE OF NORTH CAROLINA, CHARLES Salter, and Simon Rothchilds, Defendants. } No. 11, Original.

The Answer of The State of North Carolina, by Robert D. Gilmer, Its Attorney General, to the Bill of Complaint of The State of South Dakota, Complainant.

This defendant, now and at all times hereafter saving and reserving unto herself all benefit of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said complainant's said bill of complaint contained, and especially protesting that this court has no jurisdiction of either the parties to or of the subject-matter of this suit, because the matters complained of do not constitute, within the meaning of the Constitution of the United States, any controversy between the States of South Dakota and the State of North Carolina, or any of her citizens; for answer thereunto, or unto so much and such parts thereof
27 as this defendant is advised is material or necessary for her to make answer unto, this defendant, answering, saith :

I.

That she denies that she has any knowledge or information sufficient to form a belief, save by the bill of complaint herein, as to the truth of the allegation contained in the first paragraph thereof, to wit, that the said complainant "is the holder and owner in its own right, and is in the actual possession" of the "ten certain writings obligatory or bonds with coupons thereto attached," as in said bill of complaint described; and this defendant therefore denies the said allegation and demands strict proof thereof.

This defendant further says that she is informed and believes, and so alleges, that if the complainant is in the possession of said "writings obligatory," by assignment or otherwise, such transfer of possession and indicia of ownership are purely colorable and collusive, and made for the purpose of evading the provisions of the eleventh amendment of the Constitution of the United States, all of which will be hereinafter more particularly set forth in this answer.

II.

This defendant further says that it is true that certain "writings obligatory or bonds with coupons attached," as described in paragraph one of complainant's bill of complaint, and designated as

second-mortgage bonds ($800,000, dated July 1, 1867; $1,323,000, dated January 1, 1868, and $340,000, dated October 4, 1868, amounting in all to $2,463,000), were issued by the treasurer of the defendant State, and that the same purported to have been issued by authority of an act of the General Assembly of North Carolina, entitled "An act to incorporate the Western North Carolina Railroad Company," being chapter 228 Acts 1854–'55; but this de-
28 fendant alleges that the same were not issued and sold according to the provisions of the said act, which in section 37 provides as follows, to wit:

"*Be it further enacted*, That so soon as it shall become necessary to issue the bonds aforesaid, the public treasurer shall advertise in one or more newspapers, as he may think best, and invite sealed proposals for such amount of the aforesaid subscription as may be wanted at any one time, and it shall be his duty to accept those terms which may be most advantageous to the State: *Provided*, That in no event shall any of the bonds be sold for less than their par value; and any premium which may be obtained on the sale of said certificates shall be placed in the public treasury and used as other public funds, and kept or invested to pay the interest on the debt hereby authorized."

That no advertisement in the newspapers for sealed proposals was made as by said act required, but said bonds were issued and by private arrangement turned over to the authorities of the said Western North Carolina Railroad Company, who, as the defendant is informed and believes, and so alleges, sold them at a price greatly below par, thus preventing the State from receiving any premium which might have been realized by means of public advertisement and sale as provided. The defendant therefore denies that the said "writings obligatory or bonds and coupons" are valid obligations of the State, and alleges that the complainant and its assignors, both immediate and remote, had notice of the non-compliance of the said law providing for their issue and sale. And furthermore, well knowing that the defendant had denied their validity and had refused to pay interest thereon, the alleged assignors of complainant, both immediate and remote, purchased the same, as the defendant is informed and believes, and so alleges, at a purely speculative price, and for not more than twenty-five cents on the dollar. And the defendant further saith that it was the intent and direction of the Gen-
29 eral Assembly that the public treasurer should sell the bonds and pay the money to the railroad company, and there was a prohibition against selling for less than par, as above stated; that the State of North Carolina was interested that the railroad should be built and completed by as small an outlay of State bonds as possible, and furthermore, that the said railroad should be speedily completed, and the private arrangement above stated defeated the purposes of the State in these respects.

The defendant, further answering, denies any and all parts of paragraphs one and two of the said bill of complaint not herein admitted.

III.

The defendant, answering paragraph three (3) of the complainant's bill of complaint, admits "that at the time of the passage of the said act of 1866, the defendant, The State of North Carolina, was the owner (subject to the statutory lien or mortgage hereinafter set out, and to be designated as 'first mortgage') of thirty thousand shares of stock in the North Carolina Railroad Company, of the par value of three million dollars (shares one hundred dollars par)." And the defendant further admits that the State treasurer was directed, whenever certain bonds were regularly and lawfully issued under the above act, to execute mortgages as additional security to the same upon an equal amount of stock held by the State in the said North Carolina Railroad Company; but the defendant saith that the said act provided that the said transaction should be made and perfected in a particular form and manner—the provision being that the treasurer should "execute and deliver with each several bond a deed of mortgage for an equal amount of stock" in the said North Carolina Railroad Company. But this defendant denies that the several mortgages to be made by the treasurer as contemplated by the said act were ever executed, and insists that the endorsement on the said bonds as set forth in the said bill of complaint was not made in pursuance of or in conformity to the provisions of the act of the General Assembly of North Carolina (chapter 106 of the Laws of 1866–'67, referred to in complainant's bill herein), and did not have the effect of a conveyance or transfer by way of mortgage, either in law or in equity, of any of the said stock, nor did it confer a lien by way of pledge or otherwise upon the same. That no certificates of stock are numbered or otherwise identified, nor has there ever been any delivery of any shares of said stock to any of the said bondholders, or to any one for them. And the defendant further saith that the said attempted mortgages or liens are also void because of the illegal issue and sale of the bonds, as stated in paragraph two (2) of this answer.

IV.

The defendant admits paragraph four (4) of the bill of complaint herein.

V.

The defendant admits paragraph five (5) of the bill of complaint, except so much thereof as alleges that the complainant and other holders of bonds which were issued in aid of the Western North Carolina Railroad Company after the passage of the act of 1866, have a second-mortgage or equitable lien upon such an amount of the said stock as would equal in its par value the principal or par of said alleged second-mortgage bonds; and as to this part, the defendant denies the truth thereof.

VI.

The defendant, answering paragraph six (6) of the bill of complaint, says that it is true that an adjustment of the first-
31 mortgage bonds was made in pursuance of chapter 138, Acts 1879, and in accordance with the terms set forth in Exhibit "C," attached to the bill of complaint herein; but this defendant utterly denies that the said new bonds were not in law and in fact substituted for the original bonds, and alleges that it was expressly agreed that the new bonds were not given in payment, but only in renewal or substitution of the old bonds, and that the original lien on the stock of the said North Carolina Railroad Company was to be "preserved unimpaired for the security of the new bonds as fully as the old bonds" were "secured thereby." This defendant further saith that the effect of the transaction was simply a substitution of the new for the old bonds, certain interests on the old bonds being remitted.

VII.

The defendant admits that the terms of said adjustment are set forth in Exhibit "C," as alleged in paragraph seven (7) of the bill of complaint; but saith that the act of 1879, chapter 138, should be taken and considered as a part of said agreement and adjustment, a copy of which act is attached hereunto, marked Exhibit "A," and which defendant prays may be considered a part of this answer.

VIII.

The defendant, answering paragraph eight (8) of the complaint herein, saith that she has never heard or been informed, save by the complainant's bill of complaint, whether the complainant, its assignors or any prior holder of the bonds declared on, were parties to or assented to the said adjustment; but defendant denies that other holders of said mortgage bonds did not consent thereto, and alleges that, on the contrary, a large number of the said bondholders, to the extent of at least $2,213,000, assented to the said adjustment by exchanging, under the provisions of chapter 98, Acts
32 1879, their bonds for new ones (unsecured except by the faith of the State), at the rate of twenty-five per cent. of the principal thereof, so that all of the alleged second-mortgage indebtedness, amounting to about $2,463,000, has been settled by the exchange aforesaid, except, as far as can be ascertained, about $250,000. The defendant denies the remaining parts of said paragraph, although she is advised that she is not compelled to answer thereto, the same being merely allegations of law.

IX.

The defendant answering the ninth (9) paragraph of the bill of complaint, saith that it is true that by act of her General Assembly (chapter 98, Acts 1879) the defendant offered to settle the said alleged second-mortgage bonds by issuing and exchanging new interest-bearing bonds at the rate of twenty-five per cent. of the principal

of the said bonds, which said offer was accepted by all of the said bondholders except to the amount of about $250,000. This defendant further saith, that, under the circumstances, the said offer was fair and reasonable, as will appear by reference to her financial condition at that time. The indebtedness of the State, including the bonds issued in aid of the Western North Carolina Railroad Company, referred to in the bill of complaint, was then about $18,000,000 principal, on which there was due and unpaid about $8,000,000 interest, and it was claimed that she was further indebted in the sum of $12,000,000, evidenced by bonds called "special-tax bonds," on which there was due about $5,000,000 interest, which indebtedness was not recognized by the State as valid obligations. That, owing to her impoverished condition as a result of the civil war, the taxable value of the entire property of the State, both real and personal, tangible and intangible, was only about $140,000,000.

That being utterly unable to pay the current expenses of the
33 State government, to make proper provisions for the public charities and public schools, to pay the interest on the said indebtedness, and being practically in a state of bankruptcy, she endeavored to so adjust this debt as to put it into manageable shape, and this, not only for her own benefit, but for the benefit of her various creditors. Accordingly, it made offers of an adjustment of its indebtedness, which was generally accepted, and except a small fraction, its entire indebtedness, except the "special-tax bonds," above mentioned, was adjusted, in which adjustment was included the first-mortgage bonds mentioned in the bill of complaint herein.

That at the time of the said adjustment, the income of the State from the said stock of the said North Carolina Railroad Company was barely sufficient to pay the current interest on the said first-mortgage bonds, while there was due and unpaid interest to a large amount, to wit, about $750,000, and the property would not have brought an amount sufficient to have paid the said first-mortgage bond indebtedness. Under these circumstances, not only was there no surplus with which to pay the interest on the said second-mortgage bonds, but the security itself, even if valid, was worthless, the stock, as above stated, not being of sufficient value to have paid the first-mortgage bonds, together with the past-due interest thereon, the said stock then being in the hands of a receiver appointed by the Federal court. That under these conditions the defendant denies that her offer of settlement as aforesaid by the exchange of new bonds and to pay the interest thereon out of the revenue derived from general taxation (which it has faithfully done as to the bonds so issued in exchange), was unfair or unreasonable.

And this defendant, further answering the said paragraph of the complaint, denies that it has ever refused to pay the complainant
the bonds declared on in its bill of complaint herein, the said
34 complainant never having demanded payment of the same, nor having even informed the defendant of its alleged acquisition of the same, except by the filing of this bill of complaint.

X.

The defendant, answering the tenth paragraph of the bill of complaint, saith: That but for the said just and equitable settlement made with the said bondholders, there would be no surplus left after paying the interest on said indebtedness; and that such surplus should, in good morals and equity, be held by the State to be applied to the payment of the principal and interest of those bonds whose holders, by their action, made the existence of such a surplus a possibility.

XI.

The defendant, answering the eleventh (11) paragraph of the bill of complaint, saith that she has no knowledge, save by the bill of complaint, of the citizenship of Charles Salter and Simon Rothchilds.

XII.

The defendant, answering the twelfth (12) paragraph of the bill of complaint, saith that she has no knowledge or information, save by said bill of complaint, as to the ownership by Simon Rothchilds of any of the said first-mortgage bonds, or that his interest is identical with that of all other holders of the said first-mortgage bonds, and the defendant therefore denies the same. The defendant also denies the correctness of the remainder of said paragraph, although she is advised that she is not required to answer thereto, the same being merely allegations of law.

XIII.

The defendant, answering the thirteenth (13) paragraph of
35 the bill of complaint herein, saith that she has no knowledge or information, save by said bill of complaint, as to the ownership of any of the said alleged second-mortgage bonds by said Charles Salter, and therefore denies the same.

The defendant, further answering, saith that, if it be true that the said Charles Salter is a holder of any of the said alleged second-mortgage bonds, he is substantially a complainant in this suit, his interests and those whom he represents being identical with those alleged by the complainant. And this defendant is advised that he should be arrayed and treated for all purposes, and especially on the question of jurisdiction, as a party complainant in this suit.

XIV.

The defendant, answering paragraph fourteen (14) of the bill of complaint, saith that she has no knowledge or information, save by the said bill of complaint, as to the transfer and assignment of the bonds declared upon, as set forth in the said paragraph, and therefore denies the same. This defendant, further answering said paragraph, saith that if it be true that such an assignment or transfer was made, she is informed and believes, and so alleges, that it was not *bona fide*, but merely colorable and collusive, and in pursuance

of an unlawful combination for the purpose of evading the eleventh amendment to the Constitution of the United States, such combination being between the governor of the complainant State or his agents and the said Simon Schafer, of the State of New York, who, together with his brother and partner, S. M. Schafer, is the owner, as the defendant is informed and believes, and so alleges, of about 234 of the said alleged second-mortgage bonds of $1,000 each, being nearly all of the same that are now outstanding against the defendant. This defendant alleges that shortly before the alleged assignment of the bonds herein declared upon to the complainant, the same
36 being then overdue, the said Simon Schafer and brother and partner presented as aforesaid a petition to the General Assembly of the defendant State, in January, 1901, praying a settlement of said bonds held by the said Schafers, the bonds herein declared upon being among the number, and that the defendant failing to offer a settlement more favorable than had previously been accepted by the remainder of the said alleged second-mortgage bondholders (of all of which facts the complainant State had notice), and the said Schafer and brother and partner being unable to sue the State as they stated in their said petition, the said Schafer, as this defendant is informed and believes, and so alleges, thereafter concocted this scheme of colorable and collusive assignment of a small part of said bonds for the purpose of fraudulently obtaining the jurisdiction of this honorable court, not only for the purpose of enforcing the ten bonds declared upon herein, but also and chiefly for the purpose of drawing into said jurisdiction all of the outstanding bonds and collecting the amount due upon those held by him, and his said brother and partner. And this defendant is informed and believes, and so alleges, that the said Schafer and other individual bondholders, have employed counsel for the prosecution of this suit, which is brought for the purpose of carrying out such scheme in pursuance of such unlawful combination on the part of the said Schafer and brother and partner and the complainant State through its governor or other agents. And this defendant further saith, that while this suit is in form a suit by complainant State, it is really and truly brought on behalf of individuals, and is in substance a suit by the said Schafer and other individual bondholders against the State of North Carolina, contrary to the provisions of the eleventh amendment to the Constitution of the United States.

37 XV.

This defendant, further answering, saith that she has never, in the whole period of her history, had any compact or agreement whatsoever, other than that contained in the Constitution of the United States, with the complainant, The State of South Dakota, nor has the said complainant State ever informed the defendant, The State of North Carolina, that it had any claim against her, nor made any demand of her in respect to the same, nor any effort to settle or accommodate the same—the first information the defendant having had of the claim of the complainant in connection with the

bonds herein declared upon, being the filing of the bill of complaint herein. This defendant therefore denies that there was and is a controversy within the meaning of the Constitution of the United States between the complainant State of South Dakota and the defendant State of North Carolina.

Wherefore, this defendant, having fully answered, confessed, traversed and avoided or denied all the matters in the said bill of complaint material to be answered, according to her best knowledge and belief, humbly prays this honorable court to enter its judgment that this defendant be hence dismissed, with her reasonable costs and charges in this behalf most wrongfully sustained.

ROBERT D. GILMER,
Attorney General of North Carolina.
JAMES E. SHEPHERD,
GEORGE ROUNTREE,
JAMES H. MERRIMON,
Of Counsel for Defendant.

38 EXHIBIT A.

An act to adjust and renew a portion of the State debt.

The General Assembly of North Carolina do enact:

SECTION 1. That in order to renew and adjust a portion of the State debt incurred to aid in the construction of the North Carolina railroad, and obtain an extension of time for paying the same and reduce the rate of interest thereon, the governor of the State is hereby authorized to appoint three commissioners for the purpose of negotiating with the holders of the said bonds and contracting with them for a renewal of the said debt on terms which may be advantageous to the State, and which are approved of by the governor and public treasurer.

SEC. 2. The said commissioners shall be and they are hereby authorized, with the advice and consent of the said governor and public treasurer, to contract and agree with the holders of said old bonds for the renewal of the same with new bonds, to be issued under the provisions of this act, upon such terms as may be agreed on by and between the said commissioners and the holders of said bonds.

SEC. 3. The said commissioners shall issue to each and every person delivering to them such old bonds, in accordance with the terms of renewal which may be agreed on, a certificate which shall state the date, amount and number of the bonds and coupons delivered to them by each person, and number and amount of the new bonds which such person may be entitled to receive in renewal thereof. They shall file a copy of said certificate with the public treasurer immediately after the issue thereof.

SEC. 4. The said commissioners, with the advise and consent of the governor and public treasurer, shall have power to sell said new bonds at par and invest the proceeds thereof in the pur-
39 chase of the said old bonds: *Provided*, That no sale of such new bonds shall be made by said commissioners unless the

proceeds thereof can be immediately invested in the purchase of said old bonds at a rate not greater than that at which they are being exchanged for new bonds, and not more than fifty thousand dollars of said bonds shall be sold at the same time, nor shall a future sale of bonds be made until the proceeds of previous sales have been invested in the purchase of bonds as aforesaid. Upon the sale of such bonds, the commissioners shall issue a certificate to the purchaser thereof, stating the number and amount of such bonds to which such purchaser is entitled.

SEC. 5. Upon presentation of said certificate to the public treasurer, he shall deliver to the owner thereof the number and amount of State bonds to which he may be entitled according to said certificate, and for the purpose of effecting the renewal of said bonds and carrying out the purpose of this act, the public treasurer is hereby authorized and directed to issue bonds of the State, payable forty (40) years from the first day of April, anno Domini one thousand eight hundred and seventy-nine, bearing interest from the first day of April, one thousand eight hundred and seventy-nine, at such a rate as may be agreed upon, not to exceed six per cent. per annum, payable semi-annually on the first day- of April and October of each and every year until the principal shall be due.

SEC. 6. The said bonds shall be coupon bonds of the denomination of fifty, one hundred, five hundred and one thousand dollars each, and shall be signed by the governor and public treasurer, and shall be sealed with the great seal of the State; the coupons thereon may be signed by (the) treasurer alone, or have a fac-simile of his signature printed, engraved or lithographed thereon, and the said bonds and coupons shall, in all other respects, be in such form as the treasurer may direct, and shall express on their face that they are issued in renewal of said bonds; and the coupons thereon shall, after maturity, be receivable in payment of all taxes, debts, dues, licenses, fines and demands due the State, of every kind whatsoever, which shall be expressed on the face thereof.

SEC. 7. The public treasurer, before delivering any of said bonds under the provisions of this act, shall record in a well-bound book an accurate account and descriptive list of the said bonds, which shall embrace the date, amount and number thereof, and the name of the person to whom issued, and shall receive and cancel the certificate issued by said commissioners on which such bonds are issued by him; but no bonds shall be issued by the public treasurer but in execution of the provisions of this act.

SEC. 8. The said new bonds and coupons shall be exempt from all taxation whatsoever, State, county and municipal, general and special, and the same shall be expressed on the face thereof; and shall in all respects stand in the place of and be entitled to the same securities as are the old bonds and coupons aforesaid, and shall have the same lien on the stock of the State in the said railroad company which the said bonds and coupons now have; and the public treasurer shall apply the dividends received by the State on its stock in said company to the payment of the coupons on said new bonds.

SEC. 9. It shall be lawful for any executor, administrator, guard-

ian, trustee, and all persons acting in a fiduciary character, holding any of the bonds hereby authorized to be exchanged, to make the exchange provided for in this act for the bonds herein authorized to be issued; and they shall be absolved from liability or responsibilty to any person having any interest in such bonds on account of such transfer and exchange; and they shall have the power to invest any trust fund held by them in the bonds authorized to be issued
41 by this act, and the same shall be taken and regarded in all the courts of this State as a good, legal and valid investment of such trust funds by such fiduciary.

SEC. 10. The said commissioners shall hold all the bonds and coupons delivered to or purchased by them in trust for the payment of the principal and interest on the said new bonds, and shall collect and receive all payments and dividends paid and made on said old bonds and coupons so held by them from any person authorized to pay the same; and said commissioners shall pay the amount thus received to the public treasurer, and they shall be applied by him to the payment of the interest on the new bonds issued in pursuance of this act. The said old bonds shall not be cancelled, but shall remain in force until the governor shall direct the same to be delivered to the public treasurer for cancellation, at which time the said bonds shall be cancelled by the public treasurer in the presence of the governor; and they shall certify under their hands the number, amount and date of bonds and coupons cancelled by them, which certificate shall be safely kept in the office of the public treasurer.

SEC. 11. The commissioners hereby authorized to be appointed shall enter into bonds, payable to the State, in the penal sum of fifty thousand dollars, with good security, to be accepted by the public treasurer, and conditioned for the faithful performance of their duties, and shall receive as compensation for their services a commission of one-half of one per cent. on the amount of all bonds purchased by them, to be paid by the person or persons from whom the same may be purchased, and shall in no case receive any compensation from the State.

SEC. 12. In case of the death, resignation or removal of the said commissioners, or either of them, the governor shall have power to appoint other persons to fill such vacancies.

SEC. 13. This act shall be in force from and after its ratification.

Ratified 14th day of March, A. D. 1879.

42 (Endorsed:) Supreme Court, U. S., October term, 1901. Term No. 11, original. The State of South Dakota, complainant, *vs.* The State of North Carolina *et al.* Answer of the State of North Carolina. Filed April 2d, 1902.

43 The Supreme Court of the United States.

THE STATE OF SOUTH DAKOTA, Complainant,
vs.
STATE OF NORTH CAROLINA, CHARLES SALTER, and Simon Rothschild, Defendants. } No. 11, Original.

The answer of Charles Salter, one of the defendants to the bill of complaint of The State of South Dakota, complainant, respectfully shows unto the court:

I.

That this defendant admits the allegation of the 1st article of said bill, with regard to the ownership and possession of the State of South Dakota regarding the ten bonds of defendant State.

II.

That this defendant admits the allegations of the 2d article of said bill, setting forth the issuance of said bonds under acts of the General Assembly of the State of North Carolina.

III.

This defendant admits the allegation of the 3d article of said bill, setting forth that the defendant State of North Carolina was owner of 30,000 shares of stock in the North Carolina Railroad Company, describing them, subject to a prior lien; and that the bonds mentioned in said article were endorsed as in said article stated.

44 IV.

This defendant admits the allegations of the 4th article of said bill, in relation to the incorporation of the North Carolina Railroad Company, and its capital stock, the subscription thereto, and the ownership by said State of shares.

V.

This defendant admits the allegations of the 5th article of said bill, setting out that the effect of the legislative action of the defendant State of North Carolina gives the first-mortgage bondholders a lien upon all the State's stock in the North Carolina Railroad Company; and gave to complainant and the other holders of bonds issued in aid of the Western North Carolina Railroad Company, including this defendant, a second mortgage upon such an amount of said stock as should equal in its par the principal or par of the first-mortgage bonds, of which this defendant, as aforesaid, is a holder.

VI.

This defendant admits the allegations of the 6th article of said bill of *said* complaint, in relation to the first-mortgage bonds secured upon said stock having been extended, or attempted to be extended,

under the provisions of the certain acts which are set forth. And this defendant shows to the court that the effect of the action of said defendant State, set out in said article 6, was to effect an alleged extension of the bonds mentioned; but this defendant shows to the court that said attempted extension was ineffective, for the reason that holders of second-mortgage bonds, including this defendant, were not parties to the arrangement between the holders of
45 the first-mortgage bonds and the State of North Carolina for such attempted extension, which arrangements are set out in said article 6.

VII.

This defendant admits that the terms of the compromise between the defendant State of North Carolina and the holders of the first-mortgage bonds are correctly set out, as alleged in article 7.

VIII.

This defendant shows to the court, as respects the matter of said article 8, that he is advised by counsel and submits to the court that the compromise agreement, Exhibit C, to said bill, was merely an attempted extension of the time of maturity of said first-mortgage bonds and that the extension aforesaid affects the holders of second-mortgage bonds, including this defendant, and was and is unlawful and void, in that it extends the maturity of the first-mortgage bonds without the consent of the second mortgagees, who took their mortgage long before the attempted extension, including this defendant, and who acquired a vested right to pay off and redeem the first mortgage according to its terms and as respects maturity as it then existed.

IX.

This defendant admits the allegations of paragraph 9 of said bill in respect to the offer of compromise made by the State of North Carolina for the second-mortgage bonds, some of which are held by this defendant; and admits particularly the allegations of said paragraph in regard to the market value of the stock of the defendant State in the North Carolina Railroad Company. And this defendant shows to the court that this defendant has refused, and
46 now refuses, to accept the compromise of said second-mortgage bonds, for the reason that the faith of said defendant State issuing said bonds is obligated to pay them in full; and, for the further reason that the stock securing the said second-mortgage bonds is of sufficient value, over and above the lien of the first-mortgage bonds, to pay the second-mortgage bonds in full, and leave a surplus. This defendant is unable to state to the court the amount of the second-mortgage bonds with exactness.

X.

This defendant admits the allegations in the 10 article of said bill, touching the dividends upon the stock of the defendant, and the misappropriation of same by the defendant State.

XI.

This defendant admits the allegations of the 11th article of said bill, that this defendant is a citizen of the State of New York, and that the defendant Simon Rothschild is a citizen of the State of New York.

XII.

As to article 12 of said bill; this defendant has no knowledge with regard to the ownership by the defendant Simon Rothschild of some of the bonds designated and known as first-mortgage bonds, but he is informed and believes it to be true that the said Simon Rothschild is such owner of such bonds. This defendant is advised by counsel, and submits to the court, that the complainant is entitled to pay off and discharge the first-mortgage bonds, notwithstanding the attempted extension of 1880; and is entitled to have a decree for the sale of the 30,000 railroad company shares, mortgaged
47 and obligated as set out in said bill; and is entitled to have such sale free from incumbrances,—that is to say, free from the lien of the first mortgage and free from the lien of the second mortgage. This defendant shows to the court in this regard that the debt of the first mortgagees is due and payable, and that the debt of the second mortgagees, including this defendant, is due and payable; and that he is advised and submits that the bill in this cause is, in effect, both a bill to foreclose the second mortgage and a bill to redeem from the first mortgage, inasmuch as the said bill seeks to have all of said stock sold free of all incumbrances. And this defendant further shows to the court in this regard that he is advised by counsel and submits that all the said stock, securing the second issue of bonds aforesaid, is a security for each bond, and that no specific shares of stock are mortgaged for any specific bond, and that this defendant has a proportional interest in all of said stock securing the second issue of bonds, and that this defendant is entitled to be paid *pro rata* with all the other bondholders of the same issue.

XIII.

This defendant admits that he is one of the holders of second-mortgage bonds, as stated in said article 13 of said bill, and that his holding is of the following number of said second-mortgage bonds, to wit — bonds, and that said bonds are numbered as follows: — that the rights of complainant cannot be properly administered without the presence before the court of holders of second-mortgage bonds. Defendant admits and states that the holders of second-mortgage bonds, and the holders of first-mortgage bonds
48 also, are numerous, and they cannot be brought before the court by personal service, and that, in all probability, some of them cannot be found. And this defendant is advised and submits that, the individual holders of second-mortgage bonds have a lien jointly with the complainant, on all the stock which is subject to the second mortgage, and that there must be either a sale of so

much of the stock as is subject to the second mortgage, or the complainant's bill must be dismissed.

XIV.

This defendant is informed and believes it to be true that complainant, as stated in article 14, obtained title to the bonds sought to be enforced by the complainant by said bill of assignment of Simon Schafer, of New York; and that the complainant State of South Dakota is the absolute and uncondition- owner of said bonds, in manner and form as alleged in said bill, under legislation of the State of South Dakota.

Wherefore this defendant prays that plaintiff's bill be dismissed with costs, unless the court shall decree that all the stock subject to the second mortgage be sold for the benefit of all the holders of said second-mortgage bonds.

CHARLES SALTER, *Defendant.*
DANIEL L. RUSSELL, *Counsel.*
ALFRED RUSSELL, *Counsel.*

Endorsed: Supreme Court U. S. October term, 1901. Term No. 9 Original The State of South Dakota, complainant, *vs.* The State of North Carolina *et al.* Answer of Charles Salter, Filed April 2, 1902

49 Supreme Court of the United States.

The Replication of The State of South Dakota, Complainant, to the Answer of The State of North Carolina, Defendant.

This repliant, saving and reserving to *him*self all, and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith, that *he* will aver and prove *his* said bill to be true certain, and sufficient in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that, any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things this repliant is, and will be, ready to aver and prove, as this honorable court shall direct; and humbly prays, as in and by *his* said bill *he* hath already prayed.

(Signed) JOHN L. PYLE,
Attorney General of South Dakota.

(Signed) ROBERT W. STEWART,
Solicitor for Complainant.

(Signed) WHEELER H. PECKHAM,
Of Counsel for Complainant.

Endorsed: Supreme Court U. S. October term, 1901. Term No. 11, original. The State of South Dakota, compl't, *vs.* The State of North Carolina *et al.* Replication of complainant to answer of State of North Carolina. Filed April 28th, 1902.

50 Supreme Court of the United States, October Term, 1901.

THE STATE OF SOUTH DAKOTA, Complainant,
vs.
THE STATE OF NORTH CAROLINA ET AL. } No. 11, Original.

Ordered, that the testimony in this case be taken orally, in the same manner as provided for the taking of testimony in the circuit courts of the United States, sitting in equity, by rule 67 of the rules of practice in equity promulgated by this court, and that any person or persons, duly authorized by law to take testimony, agreed upon by the parties to this case, not in default for want of an answer, may take such testimony, the same as if he had been specially appointed by this court commissioner to do so, and that in default of such agreement any justice of this court may appoint a commissioner or commissioners for that purpose; that one or more persons or commissioners may be selected or appointed each to take testimony in any named locality and each to act as if he were sole commissioner; that the time to take such testimony is limited to the first day of October next, and that the same be returned to this court and filed with the clerk thereof on or before the first Monday of October, 1902.

Per MR. CHIEF JUSTICE FULLER.

May 19, 1902.

Endorsed: Supreme Court U. S., October term, 1902. Term No. 11, original, The State of South Dakota, compl't, *vs.* The State of North Carolina *et al.* Order to take testimony Filed, May 19th, 1902.

51 The Supreme Court of the United States.

THE STATE OF SOUTH DAKOTA, Complainant,
vs.
THE STATE OF NORTH CAROLINA, CHARLES Salter, and Simon Rothschilds, Defendants. } No. —, Original.

Agreement of Counsel as to Depositions.

It is agreed that Mr. I. W. Goodner of Pierre, South Dakota, shall be appointed commissioner to take depositions in the State of South Dakota, the taking of said depositions on the part of the complainant shall commence on the 18th day of August, 1902, at the office of said I. W. Goodner at Pierre, S. D. Any party to this suit shall be entitled to take depositions before said commissioner on twenty (20) days' notice to the other party to this suit, or to their solicitors or counsel.

It is agreed that Mr. Russell Lucas of the State of New York, city of New York, shall be appointed commissioner to take depositions at the instance of either party in the said suit in the city and State of New York. Any party to this suit may take depositions before said commissioner on ten (10) days' notice to the other parties, stating time and place.

It is agreed that no deposition shall be taken by either party to this cause before the 15th day of August, 1902.

ROBERT D. GILMER,
Att'y Gen'l for North Carolina.
WHEELER H. PECKHAM,
Counsel for Complainant.
D. L. RUSSELL,
Counsel for Charles Salter.

Endorsed: Supreme Court U. S. October term 1902. Term No. 9, original. The State of South Dakota, compl't, *vs.* The State of North Carolina *et al.* Stipulation to take depositions. Filed August 8, 1902.

52 The Supreme Court of the United States.

THE STATE OF SOUTH DAKOTA, Complainant,
vs.
THE STATE OF NORTH CAROLINA, CHARLES Salter, and Simon Rothschild, Defendants. } No. —, Original.

It is agreed that Ed. S. Battle of Wilmington N. C. shall be appointed commissioner to take depositions in the State of North Carolina.

Any party to this suit shall be entitled to take depositions before said commissioner on ten (10) days' notice to the other party to this suit, or to their solicitors or counsel.

WHEELER H. PECKHAM,
Of Counsel for Complainant.
R. D. GILMER, *Att'y Gen'l.*
JAS. E. SHEPHERD,
Of Counsel for State of North Carolina.
D. L. RUSSELL,
Of Counsel for Def't Charles Salter.

Endorsed: Supreme Court U. S. October term, 1902. Term No. 9, orig'l. The State of South Dakota, complainant, *vs.* The State of North Carolina *et al.* Stipulation to appoint E. S. Battle, commissioner to take depositions. Filed Aug. 30, 1902.

53 The Supreme Court of the United States.

THE STATE OF SOUTH DAKOTA, Complainant,
vs.
THE STATE OF NORTH CAROLINA, CHARLES Salter, and Simon Rothschild, Defendants. } No. —, Original.

Agreement of Counsel as to Depositions.

It is agreed that Mr. I. W. Goodner of Pierre, South Dakota, shall be appointed commissioner to take depositions in the State of South Dakota, the taking of said depositions on the part of the complainant

shall commence on the 18th day of August, 1902, at the office of said I. W. Goodner at Pierre S. D. Any party to this suit shall be entitled to take depositions before said commissioner on twenty (20) days' notice to the other party to this suit, or to their solicitors or counsel.

It is agreed that Mr. Russell Lucas of the State of New York, city of New York, shall be appointed commissioner to take depositions at the instance of either party in the said suit in the city and State of New York. Any party to this suit may take depositions before said commissioner on ten (10) days' notice to the other parties, stating time and place.

It is agreed that no depositions shall be taken by either party to this cause before the 15th day of August, 1902.

ROBERT D. GILMER,
Att'y Gen'l for North Carolina.
WHEELER H. PECKHAM,
Of Counsel for Complainant.
D. L. RUSSELL,
Counsel for Charles Salter.

Endorsed: Supreme Court, U. S. October term, 1902, Term No. 9, original The State of South Dakota, compl't, *vs.* The State of North Carolina *et al.* Stipulation to take depositions. Filed Aug. 8, 1902.

54 Supreme Court of the United States.

I, James H. McKenney, clerk of the Supreme Court of the United States, do hereby certify that the foregoing typewritten page contains a true copy of the stipulation to take depositions in the case of The State of South Dakota, compl't, *vs.* The State of North Carolina *et al.*, No. 9, orig'l, October term, 1902, as the same remains upon the files of said Supreme Court.

In testimony whereof I hereunto subscribe my name and
[SEAL.] affix the seal of said Supreme Court, at the city of Washington, this 8th day of August, A. D. 1902.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

55 In the Supreme Court of the United States, October Term 1901.

THE STATE OF SOUTH DAKOTA, Complainant, *vs.* THE STATE OF NORTH CAROLINA, Charles Salter, and Simon Rothschilds, Defendants.	No. 11, Original. In Equity.

Pursuant to the stipulation of counsel which has been certified to me by the clerk of the above-named court, and which certified stip-

ulation is hereto attached, I, I. W. Goodner, commissioner under authority thereof, and a notary public in and for the county of Hughes and State of South Dakota, on the 18th day of August, 1902, at my office on Dakota avenue, in the city of Pierre, South Dakota, proceeded to take depositions and to the examination of witnesses in the above-entitled case as follows:

Present: R. W. Stewart, Esq., attorney and counsel for the complainant, The State of South Dakota, and George Rountree, Esq., and James E. Shepherd, Esq., attorneys and counsel for the defendant, State of North Carolina; the defendant, Charles Salter, and the defendant, Simon Rothschilds, not being present either in person or by attorney or counsel.

By request of parties is is ordered that these depositions be taken by question and answer.

CHARLES N. HERREID, a witness produced on behalf of the com plainant, being first duly sworn, deposes and says in answer to interrogatories propounded to him by Mr. Stewart, of counsel for complainant, as follows:

56 Q. 1. State your name, age, residence and occupation?

Ans. Charles N. Herreid, age, 44, residence Eureka, South Dakota, occupation, attorney.

Q. 2. What official position, if any do you now occupy and hold in the State of South Dakota?

Ans. Governor of the State.

Q. 3. How long have you been governor of the State of South Dakota?

Ans. I took the oath of office and took possession of the office on January 8th, 1901. I have been governor ever since and am now the duly qualified and acting governor of the State.

Q. 4. You may state whether or not as governor of the State of South Dakota you are in possession of any papers or documents purporting to be bonds or evidences of indebtedness and purporting to have been issued and executed by The State of North Carolina, the defendant in this action?

Ans. I am.

Q. 5. Will you produce them?

Ans. I will and I do (producing certain papers).

Papers produced by the witness and by him handed to the commissioner with the request made by the witness and the counsel for the complainant that the same be marked Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 respectively, for identification.

Papers received by the commissioner and marked by him Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 in accordance with the request.

Q. 6. How did you come into possession of these papers marked Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10?

Ans. They were delivered to me in the office of the attorney general of this State and in his presence by Hon. Charles H. Burke, one of the Congressmen from this State, and I received them, acting

upon the advice of the attorney general and in accordance with chapter 134 of the laws of this State for the year 1901.

57 Q. 7. For what purpose, if any, were they delivered to you by Mr. Burke?

Ans. As a gift to become the absolute property of the State.

Q. 8. What if anything did you do with them when they were delivered to you as you have testified?

Ans. I accepted them.

Q. 9. As whose property?

Ans. The property of this State.

Q. 10. For whom, if any one, did Mr. Burke purport to be acting when he delivered you these bonds as you have testified?

Ans. The owner of the bonds—one Simon Schafer.

Q. 11. Who, if you know, is now the owner and holder of these Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10?

Ans. The State of South Dakota, the complainant in this action.

Q. 12. Has any one else, save and except the State of South Dakota any right, title or interest, or ownership of any kind or character or nature in these Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10?

Ans. No, sir.

Q. 13. Has Simon Schafer and his associates or either or any of them any interest or right or ownership of any kind or nature in or to these exhibits?

Ans. No, sir.

Q. 14. State whether or not Mr. Burke ever delivered anything else to you in relation to this transaction, save and except these exhibits?

Ans. There was a letter from Mr. Schafer to Mr. Burke, with the bonds, but I don't remember seeing it at that time, or reading it.

Q. 15. Have you that letter?

Ans. I have.

Q. 16. Will you produce it?

Ans. I will.

Paper produced by the witness and handed by the witness to the commissioner, with the request of the witness and of the counsel for the complainant that the same be marked Exhibit 11, for the purpose of identification.

58 Paper received by the commissioner and marked Exhibit 11 in accordance with said request.

Counsel for complainant at this time offered in evidence Exhibit 11, and the witness and counsel for the complainant ask that Exhibit 11 be attached to and made a part of the deposition of the witness Charles N. Herreid.

Exhibit 11 received by the commissioner and attached to the deposition as requested.

Q. 17. Under and by virtue of what authority, if any, did you receive and accept, as you have testified, these Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, as the property of the State of South Dakota?

Ans. Under and by virtue of chapter 134 of the laws of South Dakota for the year 1901, by virtue of which I was directed to re-

ceive and accept the same, and acting upon the advice of the attorney general.

Paper handed by counsel for complainant to the commissioner with the request that he mark the same Exhibit 12, for identification. Paper marked Exhibit 12 by the commissioner according to said request.

Q. 18. I now hand you Exhibit 12 and ask you to state whether or not that is a copy of the law to which you refer.
Ans. Yes, sir.

Paper marked Exhibit 12, purporting to be a certified copy of chapter 134 of the laws of the State of South Dakota for the year 1901, with the seal of the State of South Dakota affixed thereto now offered in evidence by counsel for the complainant and the commissioner is requested by the witness and the counsel for the
59 complainant to receive the same and attach it to and make it a part of the deposition of the witness Charles N. Herreid.

Exhibit 12 received by the commissioner and attached to the deposition as requested.

Exhibit 1, purporting to be bond No. 3807 and purporting to have been issued July 1, 1867 by the defendant The State of North Carolina to bearer in the sum of one thousand dollars ($1000.00) due on the 1st day of July, 1897, together with fifty-eight interest coupons attached, each in the sum of thirty ($30.00) — and purporting to represent the semi-annual interest due on the bond from the 1st day of January, 1869, to the maturity of the bond, and

"Exhibit 2," purporting to be bond No. 3815, and purporting to have been issued July 1st, 1867, by the State of North Carolina to bearer in the sum of one thousand ($1,000.00) dollars, due July 1st, 1897, together with fifty-eight interest coupons, each in the sum of thirty ($30.00) dollars, and purporting to represent the semi-annual interest due on the bond from the 1st day of January, 1869, to the maturity of the bond, and "Exhibit 3," purporting to be bond No. 3860, and purporting to have been issued July 1st, 1867, by the defendant, The State of North Carolina, to bearer in the sum of one thousand ($1000.00) dollars, due July 1st, 1897, together with fifty-eight interest coupons, attached, each in the sum of thirty ($30.00) dollars, and purporting to represent the semi-annual interest due on the bond from the 1st day of January, 1869, to the maturity of the bond, and

60 "Exhibit 4," purporting to be bond No. 3861, and purporting to have been issued July 1st, 1867, by the defendant, The State of North Carolina, to bearer, in the sum of one thousand ($1000.00) dollars, due July 1st, 1897, together with fifty-eight interest coupons attached, each in the sum of thirty ($30.00) dollars, and purporting to represent the semi-annual interest due on the bond from the 1st day of January, 1869, to the maturity of the bond, and

"Exhibit 5," purporting to be bond No. 4214, and purporting to have been issued July 1st, 1867, by the State of North Carolina, to

bearer in the sum of one thousand ($1000.00) dollars, due July 1st, 1897, together with fifty-eight interest coupons attached, each in the sum of thirty ($30.00) dollars, and purporting to represent the semi-annual interest due on the bond from the 1st day of January, 1869, to the maturity of the bond, and

"Exhibit 6," purporting to be bond No. 4240 and purporting to have been issued July 1st, 1867, by the State of North Carolina to bearer in the sum of one thousand ($1000.00) dollars, due July 1st, 1897, together with fifty-eight interest coupons attached, each in the sum of thirty ($30.00) dollars, and purporting to represent the semi-annual interest due on the bond from the 1st day of January, 1869, to the maturity of the bond, and

"Exhibit 7," purporting to be bond No. 4246, and purporting to have been issued July 1st, 1867, by the State of North Carolina, to bearer in the sum of one thousand ($1000.00) dollars, due July 1st, 1897, together with fifty-eight interest coupons attached, each in the sum of thirty ($30.00) dollars, and purporting to represent the semi-
annual interest due on the bond from the 1st day of January,
61 1869, to the maturity of the bond, and

"Exhibit 8," purporting to be bond No. 4413, and purporting to have been issued July 1st, 1867, by the State of North Carolina, to bearer in the sum of one thousand ($1000.00) dollars, due July 1st, 1897, together with fifty-eight interest coupons attached, each in the sum of thirty ($30.00) dollars, and purporting to represent the semi-annual interest due on the bond from the 1st day of January, 1869, to the maturity of the bond, and

"Exhibit 9," purporting to be bond No. 4415, and purporting to have been issued July 1st, 1867, by the State of North Carolina to bearer in the sum of one thousand ($1000.00) dollars, due July 1st, 1897, together with fifty-eight interest coupons attached, each in the sum of thirty ($30.00) dollars, and purporting to represent the semi-annual interest due on the bond from the 1st day of January, 1869, to the maturity of the bond, and

"Exhibit 10," purporting to be bond No. 4416, and purporting to have been issued July 1st, 1867, by the State of North Carolina, to bearer in the sum of one thousand ($1,000.00) dollars, due July 1st, 1897, together with fifty-eight interest coupons attached, each in the sum of thirty ($30.00) dollars, and purporting to represent the semi-annual interest due on the bond from the 1st day of January, 1869, to the maturity of the bond,

Were now offered in evidence by counsel for the complainant and the commissioner was requested by the witness and counsel for complainant to receive the same and attach the same to and make the
same a part of the deposition of the witness Charles N. Herreid.
62 Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 were received by the commissioner and were attached to the deposition of Charles N. Herreid by the commissioner as requested.

It is hereby stipulated and agreed by and between the parties to this action acting herein by and through their respective counsel and attorneys that the original bonds and coupons marked Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, may be withdrawn and that certified

copies of the same made and certified by the commissioner may be substituted in place thereof and that said copies when so made may be attached to this deposition in place of said originals.

(Signed) JAS. E. SHEPHERD.
(Signed) GEORGE ROUNTREE.
(Signed) ROBERT W. STEWART.

Q. 19. Have these bonds and coupons Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 been paid?

Ans. No.

Q. 20. Has any part of them been paid?

Ans. No.

Q. 21. How much is now due upon these bonds and coupons from the defendant The State of North Carolina to the complainant The State of South Dakota?

Ans. From the computation just now made by counsel in this case it appears that there is about $50,819.53 due.

Cross-examination:

The counsel for the State of North Carolina without waiving its protest heretofore made against the jurisdiction of the court, proceeded to cross-examine the witness, as follows:

63 Q. 1. Will you please give the date of the delivery of the bonds as testified by you, and state also, who were present at the time of said delivery?

Ans. On or about September 21st, 1901. There were present Congressman Burke, Attorney General Pyle and his associate counsel, Col. R. W. Stewart, and myself.

Q. 2. Had you heard anything in regard to these bonds before that date and from what source?

Ans. Yes, from Congressman Burke and Attorney General Pyle.

Q. 3. Will you be kind enough to state what was said to you by Congressman Burke and also the attorney general in reference to the matter?

Ans. That there was a certain party who owned and held certain bonds issued by the State of North Carolina that he desired to donate to the State of South Dakota with the suggestion or request that the proceeds be used for the benefit of the State university.

Q. 4. Was any reference made during that interview with Mr. Burke—that is, the interview several weeks prior to the delivery of the bonds—in reference to the employment of counsel and the bringing of suit, and if so, what was it?

Ans. I don't remember, but I think he said that he would or had talked the matter over with the attorney general.

Q. 5. Then at the time of the delivery of these bonds you say that Col. Stewart was the associate of the attorney general in regard to their collection?

Ans. At that time I understood that it might be necessary to bring an action and that Col. Stewart had been associated with the attorney general in the matter.

Q. 6. Had Col. Stewart been spoken to or employed by you at that time?

Ans. No, sir.

64 Q. 7. Or had you authorized at that time the employment of any counsel—that is to say, before the bonds had been assigned to you?

Ans. I never understood and I don't understand now that I had any authority or anything to do with the collection of the bonds, that being the duty of the attorney general.

Q. 8. Where is the attorney general now?

Ans. He is dead.

Q. 9. What was done by you after you accepted the bonds—what action was taken by you?

Ans. I left them in the office of the attorney general.

Q. 10. Why were they left with the attorney general?

Ans. For collection.

Q. 11. Had you before delivering them to the attorney general for collection or at any other time made any demand upon the State of North Carolina for their payment, or attempted to negotiate with the said State in reference to their payment, or did you notify or cause to be notified the said State of the acquisition by the State of South Dakota of the said bonds?

Ans. Whatever has been done has been done by the legal department of the State.

Q. —. Within your own knowledge has any one in behalf of the State before the beginning of this suit made any such demand? Or attempt to negotiate? Or notified the State of North Carolina of the acquisition of the said bonds?

Ans. I don't know. I was called by Mr. Pyle into his office to receive these bonds, and assumed that he would do whatever was necessary to do in the premises or with reference to the matter.

Q. 13. Did you know anything of the passage of this act, chapter 134 of the Laws of 1901, before the delivery of these bonds?

Ans. I recall the passage of this particular act, that is all.

65 Q. 14. Were you consulted in regard to the introduction or passage of the act?

Ans. No; the bill may have been mentioned or talked of in my presence, like any other pending legislation. I remember it was my surmise at the time when I signed the bill that it was intended to furnish a way for funds for a new capitol building.

Q. 15. Were these bonds spoken of at the time you heard this bill discussed?

Ans. I never heard of the bonds until they were spoken of by Mr. Pyle and Mr. Burke as I have testified heretofore.

Q. 16. Can you tell me by reference to the Senate Journal when this bill was introduced, and by whom?

Ans. From the book which you have shown me, which is the Journal of the Senate for 1901, I find on page 1037, under date of March 1st, 1901, that senate bill No. 224 was introduced and had its first reading on that day, said bill becoming chapter 134 of the

laws of that year, and that it was introduced by the committee on State affairs.

Q. 17. Who was on the committee of State affairs of the senate.

Ans. I don't remember. By reference to the Senate Journal, page 109 I find that the senate committee on State affairs consisted of H. T. Cooper, chairman; Joseph Leech, A. F. Le Claire, J. F. Whitlock, George H. Few, R. W. Stewart, Pierce Cahill, Peter A. Overseth and Fred. S. Rowe.

Q. 18. The R. W. Stewart mentioned is one of the counsel for the complainant in this suit, is he not?

Ans. Yes.

Q. 19. Do you know the transferer or assignor of these bonds, Mr. Schafer?

Ans. No, sir, I do not.

Q. 20. Do you know whether he has any financial interest in the State of South Dakota, or any other interest?

66 Ans. I do not know.

Q. 21. Do you know whether he has lived or been in the State of South Dakota?

Ans. I do not.

Q. 22. I understood you to say that when you left the bonds with Mr. Pyle that there would probably be a suit necessary to collect them; is that so?

Ans. What I mean to be understood as saying, is this: That I understood from Mr. Pyle that there was a dispute about the amount due upon said bonds, and that it might require an action to settle the question of the amount due.

Q. 23. Did it not occur to you that that dispute, if any, might be settled by negotiation?

Ans. I took it for granted that the legal department would attend to the matter and do whatever was necessary. I did not consider that it was any of my individual work, at all.

Q. 24. What provision was made for the payment of the costs of the suit by the State of South Dakota?

Ans. I don't know any more about that than any other costs incurred by the attorney general. I presume they are paid out of his expense account, like all other matters in his department.

Q. 25. Then you do not know whether there was any special agreement or understanding between the representatives of the State of South Dakota and any other person or persons with reference to the payment of the costs of this suit?

Ans. I do not.

Q. 26. Was there not an agreement or understanding that this money, if collected, was to be devoted to the State University of South Dakota?

Ans. No, sir.

Q. 27. Have you received any other donation under this

67 act of the legislature to which you refer?

Ans. Well, I received a donation of two hundred dollars and which I used to buy books for the new normal school at Aber-

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

deen, but I don't consider that it was strictly under the provisions of this act.

CHARLES N. HERRIED.

(Here follows Exhibit No. 1, being reproduction of bond and coupons.)

68 UNITED STATES OF AMERICA, } ss:
State of South Dakota, County of Hughes, }

I, I. W. Goodner, commissioner appointed to take testimony in the case of State of South Dakota *vs.* State of North Carolina, *et al.*, and a notary public within and for the county of Hughes, State of South Dakota, do hereby certify that I have carefully compared the annexed and foregoing with "Exhibit 1" as offered in evidence on behalf of the complainant at the taking of the deposition of Charles N. Herreid in said case on the 18th day of August, 1902, and that the same is a true and correct copy thereof.

In witness whereof, I hereunto set my hand and seal as notary public, this 18th day of August, 1902.

I. W. GOODNER,
Commissioner and Notary Public, Hughes County, South Dakota.

(Here followed Exhibits Nos. 2 to 10, inclusive, being reproductions of bonds and coupons similar to Exhibit No. 1, which are omitted in printing this record per stipulation of counsel.)

69 EXHIBIT No. 11. I. W. Goodner, Commissioner.

Page 1.

OFFICE OF SCHAFER BROTHERS, No. 35 WALL STREET,
NEW YORK, *September 10th*, 1901.

P. O. Box 2217.

Hon. Charles H. Burke.

DEAR SIR: The undersigned, one of the members of the firm of Schafer Bros., has decided, after consultation with the other holders of the second-mortgage bonds issued by the State of North Carolina, to donate ten of these bonds to the State of South Dakota.

The holders of these bonds have waited for some thirty years in the hope that the State of North Carolina would realize the justice of their claims for the payment of these bonds.

The bonds are all now about due, beside, of course, the coupons, which amount to some one hundred and seventy per cent. of the face of the bond.

The holders of these bonds have been advised that they cannot maintain a suit against the State of North Carolina on these bonds, but that such a suit can be maintained by a foreign State or by one of the United States.

The owners of these bonds are mostly, if not entirely, persons

who liberally give charity, to the needy, the deserving and the unfortunate.

These bonds can be used to great advantage by States or foreign governments; and the majority owners—

70 EXHIBIT No. 11. I. W. Goodner, Commissioner.

Page 2.

OFFICE OF SCHAFER BROTHERS,
No. 35 WALL STREET, NEW YORK.

P. O. box 2217.

would prefer to use them in this way rather than take the trifle which is offered by the debtor.

If your State should succeed in collecting these bonds it would be the inclination of the owners of a majority of the total issue now outstanding to make additional donations to such governments as may be able to collect from the repudiating State, rather than accept the small pittance offered in settlement.

The donors of these ten bonds would be pleased if the legislature of South Dakota should apply the proceeds of these bonds to the State university or to some of its asylums or other charities.

Very respectfully,

(Signed) SIMON SCHAFER.

71 EXHIBIT 12. I. W. Goodner, Commissioner.

OFFICE OF THE SECRETARY OF STATE,
PIERRE, SOUTH DAKOTA.

CHAPTER 134. [SEAL.]

(S. B. 224.)

Providing for the Acceptance of Grants by the State.

An act to require the acceptance and collection of grants, devises, bequests, donations, and assignments to the State of South Dakota.

Be it enacted by the legislature of the State of South Dakota:

SEC. 1. Governor to accept.—That whenever any grant, devise, bequest, donation or gift or assignment of money, bonds or choses in action or of any property, real or personal, shall be made to this State, the governor is hereby directed to receive and accept the same, so that the right and title to the same shall pass to this State; and all such bonds, notes or choses in action, or the proceeds thereof when collected, and all other property or thing of value, so received by the State as aforesaid shall be reported by the governor to the legislature, to the end that the same may be covered into the public treasury or appropriated to the State university or to the public schools or to State charities as may be hereafter directed by law.

SEC. 2. Duty of attorney general.—Whenever it shall be necessary to protect or assert the right or title of the State to any prop-
72 erty so received or derived as aforesaid, or to collect or reduce into possession any bond, note, bill or chose in action, the attorney general is directed to take the necessary and proper proceedings and to bring suit in the name of the State in any court of competent jurisdiction, State or Federal, and to prosecute all such suits, and is authorized to employ counsel to be associated with him in such suits or actions, who, with him, shall fully represent the State and shall be entitled to reasonable compensation out of the recoveries and collections in such suits and actions.

Approved March 11, 1901.

73 STATE OF SOUTH DAKOTA, }
Department of State. }

I, O. G. Berg, secretary of the State of South Dakota, hereby certify that I have carefully compared the annexed and foregoing with the original chapter 134 of the Laws of the State of South Dakota, passed and enacted by the legislature of the State of South Dakota at its regular biennial session in 1901, and approved by the governor of the State on March 11th, 1901, and that the same is a true and correct copy thereof.

In testimony whereof, I have hereunto set my hand and
[SEAL.] affixed the great seal of the State, this 14th day of August, A. D. 1902.

O. C. BERG,
Secretary of State,
By E. N. GRAVES,
Assistant Secretary of State.

74 The foregoing deposition of Charles N. Herreid, was sworn to and subscribed before me at the time and place mentioned above.

IVAN W. GOODNER,
[SEAL.] *Commissioner.*

UNITED STATES OF AMERICA, }
State of South Dakota, County of Hughes, } *ss:*

I, Ivan W. Goodner, duly appointed by stipulation and agreement of counsel, commissioner to take depositions in the State of South Dakota, in the above-entitled case, and being also a notary public within and for the county of Hughes, State of South Dakota, hereby certify that the above-named witness, Charles N. Herreid, was by me first duly sworn to testify to the truth, the whole truth and nothing but the truth; that his deposition was reduced to writing by myself in the presence of the said witness, and in the presence of such of the parties and counsel as attended, and when completed was read over to said witness and subscribed by him in my presence, and in the presence of such of the parties and counsel as attended. That said

deposition was taken, pursuant to the annexed stipulation, at the office of Ivan W. Goodner, on Dakota avenue, in the city of Pierre, South Dakota, beginning on the 18th day of August, 1902, and continuing until finished on that day, as set forth. That the parties were represented at the taking of said deposition by their respective counsel, as set forth. That the several exhibits recited were offered in evidence and marked as specially noted in the foregoing deposition, and that the stipulation of counsel as to the substitution of certified copies was made during the taking of the deposition in my presence, as set forth in the foregoing deposition, and that I
75 am not counsel or relative of either party, or otherwise interested in the event of this suit.

IVAN W. GOODNER,
[SEAL.] *Commissioner and Notary Public in and for Hughes County, South Dakota.*

Fees—Notary.

407 folios at 20c..... $81.40

Paid by complainant,
IVAN W. GOODNER, *Commissioner.*

Endorsed on envelope: To the clerk of the United States Supreme Court, Washington, D. C. In the Supreme Court of the United States, The State of South Dakota, complainant, *vs.* The State of North Carolina, Charles Salter and Simon Rothschilds, defendants. Deposition of Charles N. Herreid, a witness on behalf of the complainant in the above-entitled cause, taken before me and by me sealed and transmitted to the clerk of the above-named court. Ivan W. Goodner, commissioner, and notary public in & for Hughes county, South Dakota.

Office Supreme Court of U. S. Received Aug. 22, 1902. Opened in open court by order of court and filed the 15th of December 1902. Jas. H. McKenney, clerk, U. S. Sup. Ct.

Endorsed: Supreme Court U. S. October term, 1902. Term No. 9, original. The State of South Dakota, complainant, *vs.* The State of North Carolina *et al.* Deposition of Charles N. Herreid a witness for the complainant. Filed Dec. 15th, 1902.

76 Supreme Court of the United States, October Term, 1901.

STATE OF SOUTH DAKOTA, Complainant, *against* THE STATE OF NORTH CAROLINA, CHARLES SALTER, and Simon Rothschild, Defendants.	No. 11, Original. In Equity.

Pursuant to the stipulation of counsel which has been certified to me by the clerk of the above-named court, and which certified stipulation is hereto attached, I, Russell Lucas, commissioner under authority thereof, on the 8th day of September, 1902, at the office of Addison G. Ricaud, Esq., No. 25 Broad street in the city of New

York, proceeded to take depositions and to the examination of the witnesses in the above-entitled case as follows:

Present: Wheeler H. Peckham, Esq., counsel for complainant; James H. Merriman, Esq., George Rountree, Esq., and James E. *Shepherd, Esq., counsel for defendant State of North Carolina.*

It is stipulated that the testimony now to be taken shall be taken by a stenographer, written out by him and subscribed by the witness.

77 WILLIAM HENRY GIBSON, a witness produced on behalf of the complainant, being first duly sworn, deposes and says in answer to the interrogatories propounded to him by Mr. Peckham, of counsel for complainant, as follows:

Q. Where do you reside?

A. I reside in 39 Temple street, Long Island City, borough of Queens, New York.

Q. How long have you resided there?

A. 27 years.

Q. Do you know Simon Rothschild?

A. Yes, sir.

Q. Where does he live?

A. He lives at present at the Hotel Netherlands, 5th avenue.

Q. In what city, please?

A. New York city.

Q. Do you also know Charles Salter?

A. Yes, sir.

Q. Where does he reside?

A. Flatbush, Long Island.

Q. How long has Mr. Salter resided in Flatbush, Long Island?

A. Well, it is over ten years; I don't know how much more.

Q. This place that you designate as Flatbush, can you tell me within what city that is?

A. Well, it is in Brooklyn. It is part of the city of Brooklyn, I believe, now.

Q. Is there any city of Brooklyn now?

A. No, sir; it is a part of the Greater New York, I should state.

Q. Do you know whether he is a citizen of the State of New York?

A. Yes, sir.

Q. Is he or is he not?

A. He is a citizen.

78 Q. Natural born or naturalized?

A. That I can't tell you, sir.

Q. Then how do you know that he is a citizen?

A. Well, I have known him a great many years, and from what he has informed me, he is a citizen.

Q. Have you ever known him living anywhere else than in the city of New York?

A. No sir.

Q. How about Simon Rothschild; do you know whether he is a citizen?

A. Yes.

Q. And of what?

A. Well, the only knowledge that I have is what he has informed me. I have known him for about 35 years.

Q. Where, in the city of New York?

A. Here.

Q. Do you know whether Mr. Salter and Mr. Rothschild or either of them are the owners of any bonds of the State of North Carolina?

A. Yes sir.

Q. What do you know about it? Tell us.

A. I know from the holders of the different kinds of bonds, I know that I have had some of them in my possession.

Q. Which owns which?

A. Mr. Rothschild owns some of the first and some of the seconds, and Mr. Salter owns some of the seconds.

Q. When you say "some," can you give us any idea how many?

A. No; I could not. Of course I can guess about.

Q. I don't want any guessing. How do you know Mr. Salter owns any?

A. I do.

Q How do you know it, I say?

A. Because I have had them in my possession, and have examined them.

79 Q. Which did you say that he owned?

A. The seconds.

Q. And as for Mr. Rothschild, which does he own?

A. He owns part of each—some first and some seconds.

Q. Do you know anything about the holders, who are the holders, or whether many or few people, of these second-mortgage bonds of the State of North Carolina?

A. That I do not know; they are scattered.

Q. Do you know anything about Mr. Rothschild, after being served with a copy of the bill in this case, calling at the First national bank in the city of New York with reference to the first-mortgage bonds?

A. I do.

Q. How do you know it?

A. I called there with him myself.

Q. Just state what occurred there?

Counsel for defendant State of North Carolina object as to what occurred between Mr. Rothschild and the president of the bank.

A. We went to the bank. We inquired for the president and they stated he was not in. We were referred to another officer, and Mr. Rothschild handed him the bill of equity that he had received, and he stated to him that he thought he ought to notify the other bondholders; that he supposed they knew all about it because it had been published in all the newspapers in North Carolina and various other papers throughout the country, and the gentlemen replied the

only interest they had in the matter was that they were acting as agents for the State and paying the coupons, but that he would read the paper over and take the matter into consideration.

Cross-examination by Mr. MERRIMAN:

Q. Do you sustain any relation to Mr. Rothschild?

A. No sir.

Q. You are not his agent?

A. No sir.

Q. Don't do any kind of business for him?

A. I am employed by a firm that does his business—that makes his investments.

Q. What firm is that?

A. Schafer Bros.

Q. What Schafer is that?

A. Well, the present one, the only one living, now, of the firm, is Samuel M. Schafer. The other member died about two or three weeks ago.

Q. Samuel M. Schafer, the man that is named in this bill?

A. I don't know anything about the bill, what bill you refer to.

Q. You said you saw that bill in equity, didn't you?

A. That I don't know; I didn't read it.

Q. Do you know anything of Mr. Schafer getting some bonds of the State of South Dakota?

A. No sir.

Q. You never heard of that?

A. No sir.

Q. Where does Mr. Schafer live?

A. The one that is living?

Q. Yes sir.

A. He lives at 52 West 46th street.

Q. What does he do?

A. He is a banker and broker.

Q. And you stay in his house?

A. Did I stay in his house?

Q. Yes; you are in his house, are you not; don't you assist him in some way?

A. Yes sir; I am his confidential clerk.

Q. You are his confidential clerk. Now, if you are his confidential clerk, if he had given some bonds to South Dakota you would have known it?

A. Not necessarily.

Q. Don't he confide to you everything he does about his business?

A. No sir.

Q. What do you mean by being his confidential clerk?

A. In regard to a customer that comes in there to buy and sell stocks, he asks me what I think of it, and I generally decide whether we shall do it or not, and in regard to investments and such things.

Q. He didn't consult you whether he should give some bonds to the State of South Dakota?

A. No sir.
Q. How long have you been in this man's service?
A. 37 years.
Q. Did you ever hear Mr. Schafer talking about this suit between the State of South Dakota and North Carolina?
A. Maybe I might have overheard some conversation. I can't say that I know anything about it.
Q. Whom did you hear talking about it?
A. I have heard Mr. Simon Schafer, the one that is dead, speak about it.
82 Q. You didn't hear the one that is living talk about it?
A. I may have overheard some conversation with his brother, and I can't say what it was.
Q. What did you hear the man who is dead say about this suit between South Dakota and the State of North Carolina?

Counsel for complainant objects to the question.

A. I didn't hear him say anything.
Q. Didn't you say that you had heard them conversing about this suit?
A. Yes; he told me about a newspaper article.
Q. Who did, the dead man or the living one?
A. The one that is dead, and asked me if I knew anything about it. I told him No, I did not know anything about it. It was something in regard to the appointment of a commissioner or something, I didn't know just what it was. I guess it was this thing you refer to.
Q. Did you ever see R. W. Stewart, of South Dakota?
A. No sir, not to my recollection.
Q. Did you ever see a gentleman by the name of Burke?
A. No sir.
Q. Of that State?
A. No sir.
Q. Do you remember to have seen any person from the State of North Carolina at your place of business talking about this matter?
A. Yes sir.
Q. Who was he?
A. Governor Russell and Mr. Ricaud.
Q. When was that?
83 A. Governor Russell was about a week ago; Mr. Ricaud was last Saturday.
Q. Was that the first time you ever saw them there?
A. No sir.
Q. I want you to tell when you first saw them there, Mr. Gibson, if you please?
A. I can't recollect the first time I saw them.
Q. Try and recollect, if you can, when was the first time you ever saw Governor Russell at that place?
A. I am trying to think—I don't know.
Q. You can't fix it at all?
A. It might be a year ago or two years ago; I can't recollect.
Q. It was more than a year ago, wasn't it?

A. I don't think so.
Q. Tell us, as near as you can?
A. It might be between a year and two years.
Q. It might be between a year and two years?
A. Yes sir.
Q. What was Mr. Russell there for?
A. The last time?
Q. No; the first time?
A. I don't know.
Q. Didn't you hear a conversation between him and Mr. Schafer at that time?
A. No sir.
Q. Did they converse together at that time?
A. Yes sir.
Q. In your presence?
A. No sir.
Q. In your banking-house?
A. Yes sir.
Q. How long was the Governor there?
A. I don't know.
84 Q. Did he have any private banking business with your concern?
A. No sir; not to my knowledge.
Q. That was some time before this suit was brought, wasn't it?
A. Yes sir.
Q. About how long would you say?
A. Well, you will have to give me the date of the suit.
Q. It was after October, 1901. Were they talking about bringing this suit at that time?
A. I don't know sir; I didn't overhear the conversation.
Q. Who was with the governor from North Carolina at that time?
A. I don't think anybody was with him.
Q. Did Mr. Schafer tell you of the conversation he had with Governor Russell?
A. No sir.
Q. Never told you anything about it at all?
A. No sir.
Q. Did you hear Mr. Schafer say anything about collecting his bonds against North Carolina after Governor Russell was there?
A. No sir.
Q. Did you hear either one of the Schafers speak of it?
A. No sir.
Q. Didn't you hear them talk about bringing a suit against the State to collect these bonds at any time?
A. A long time ago.
Q. Now, when was that; let us get at that?
A. It must be about 20 years ago.
85 Q. Never since that time?
A. Between 20 years and never is quite a time.
Q. Do you know where Mr. Schafer got those bonds?

A. Mr. Schafer told me that he invested in those bonds when he was a young man. He made his first investment in them; and he said that he thought that they were a good investment, and he bought them for that purpose.

Q. Which one of the Schafers told you that?

A. Mr. Simon Schafer, the one that is dead. And later on he bought some more of them, and that is how he came to speak to me about bringing a suit. He said that he thought he was entitled to his money, and he was going to try and get it.

Q. Is Mr. Rothschild a native of America, or is he a foreigner?

A. I think he was born abroad, as far as he has told me, but I wouldn't swear to it, but I think he is born abroad; I think he was born in Germany.

Q. You have got no personal knowledge of his being a citizen of this country, have you?

A. No sir; only what he has informed me from conversation I have had with him a good many years about voting for different people.

Q. Did you know of Mr. Schafer, or either one of them employing any counsel in North Carolina about this matter?

A. No sir.

Q. Did you never hear that they employed Mr. Busbee?

A. No sir.

Q. Do you know anything about the petition that they pre-
86 ferred to the General Assembly of North Carolina about these bonds, in 1901?

A. No sir.

Q. Did you never hear about that?

A. No sir.

Q. Did you never see that petition?

A. No sir.

Q. Well, the Schafers don't seem to have put much confidence in their confidential clerk; they didn't let you know about these things?

A. That is his private matter. I am not his confidential clerk in private matters.

Q. Only in public matters?

A. Only in regard to the firm—the business of the firm.

Q. Did the firm own these bonds, or did just Mr. Simon Schafer own them?

A. Mr. Simon Schafer owned them.

Q. Individually?

A. Yes sir.

Q. And he is dead?

A. Yes sir.

Q. When did he die?

A. About three weeks ago.

Q. Have you any particular business relations with Mr. Salter?

A. You mean personally?

Q. In any way; any business relations of any kind with Mr. Salter?

A. The only relations we ever did have, I have known him for a good many years, and we were interested—some of our customers—in different things he was interested in, and he used to call in quite often to consult in regard to these various enterprises.

Q. What various enterprises are you talking about?

A. Well, in regard to some mining stocks that he was in, and also in regard to these North Carolina bonds.

87 Q. They talked about those things often, you say?

A. He used to come in quite often, yes sir, in regard to these things, principally about his mining stocks. There was some companies there that we were interested in; there was some litigation about. He used to ask me about it.

Q. You also said he talked about the North Carolina bonds that were held——

A. Yes sir; he told me he held these bonds.

Q. Did you hear Mr. Schafer and Salter talking together about their bonds against the State of North Carolina?

A. Yes sir; I heard them condoling each other and said they would probably get their money some day.

Q. When was that?

A. That was in our office.

Q. When?

A. Oh, six years ago.

Q. Any time since that?

A. Yes, about two years ago he called in and wanted to know if there was anything new in regard to it, and I believe Mr. Schafer told him nothing new yet.

Q. Nothing new yet. Didn't he tell him there would be something new pretty quick?

A. Not that I heard.

Q. You didn't know what he meant by saying that there was nothing new yet?

A. He didn't get his money yet.

Q. Didn't he tell him he was still trying to get it?

A. Yes sir.

Q. What did Salter say to that?

A. He said it was about time, he said. He said he held the bonds for thirty years and he was getting tired.

88 Q. Did they sustain any relation to each other at all in a business way, Salter and Mr. Schafer?

A. No sir; they might pos-ibly have had one transaction in all that time, or something of that kind.

Q. Was Salter one of his customers?

A. No sir; he was not a customer.

Q. Who is Salter?

A. He is retired. He speculates in mining stocks and such things like that. I had made his acquaintance by being a member of the Consolidated exchange and he was interested in some mining stock that some of our customers were interested in, and we used to confer about it.

Q. What do you mean by saying that he had retired?

A. He is not in any active business.
Q. How long since?
A. A good many years. As long as I have known him.
Q. Is Mr. Salter an old man?
A. Yes sir.
Q. He is a native of this country, isn't he?
A. I can't tell you that.
Q. Can't you tell whether he is a German, or——
A. I think he is a native. I can't say positively, though.
Q. You said that you had had these bonds in your possession; what did you mean by that?
A. Bonds that belonged——
Q. Belonged to Mr. Rothschild and Salter?
A. Mr. Rothschild's bonds we bought them and Mr. Salter's bonds he brought them into the office one day for me to examine. You see, when we buy bonds, Mr. Schafer used to hand them over to me to sort them, the various kinds; some were special tax and
89 some were endorsed, &c.
Q. Do you know whether or not Mr. Schafer—either one of the Schafers—or Mr. Salter and the Schafers together, or separately, consulted counsel about collecting these bonds; and if so, when?
A. I do not.
Q. Who is the counsel of the Schafer bank?
A. Hoadley, Lauterbach & Johnson.
Q. Do you know of their ever consulting Mr. Peckham about this suit?
A. I do not.
Q. Never heard them say so?
A. Never heard them mention Mr. Peckham's name.
Q. Neither of them?
A. No sir.
Q. Did you ever hear Mr. Salter mention his name?
A. No sir.
Q. Did you ever see Senator Butler of North Carolina there?
A. I don't know him. Never heard of him.
Q. You never saw Mr. Burke of South Dakota there?
A. No sir.
Q. You never heard of him?
A. No sir.
Q. How long have you been confidential clerk of this banking concern of Schafer?
A. I have been employed by them 37 years. I have been their confidential clerk about 25 years.
Q. And yet you know nothing more at all about this controversy between South Dakota and North Carolina than you have stated?
A. No sir; that was their private business. I had nothing at all to do with it.
90 Q. What was their private business?
A. Mr. Simon Schafer. When I say confidential clerk I am confidential clerk for the firm, not in their private capacity.

Q. They owned these bonds as a firm, didn't they?
A. No, sir; Simon Schafer owned these bonds.
Q. The firm had nothing to do with it at all?
A. That I can't say. They may have had an interest in it, but it was, I understand, private property of Simon Schaeffer.
Q. Still, the other Schafer may have had some interest?
A. Yes, sir; he may have.
Q. Why do you say that?
A. Because there are things that they may have interest in; for instance, they may have been in their private name and still have an interest in it. They may have a certain amount of money invested in it, for all I know.
Q. Was that usual between these two men?
A. Yes, sir.
Q. That was usual?
A. Yes, sir; that was usual.
Q. What kin are they; were they brothers?
A. Yes, sir; brothers.
Q. And it was usual when one purchased bonds or securities of any kind that the other was some way interested in them?
A. Yes, sir; for instance, they buy a piece of real estate and put it in one name although they had an agreement on the books that they had equal shares in it.
Q. That was pretty nearly the universal case between them?
A. Yes, sir.

91 Q. Mr. Gibson, I will ask you again, if you haven't heard these two gentlemen, S. M. Schafer and S. Schafer, speak of Mr. F. H. Busbee of North Carolina as their attorney in respect of these bonds?
A. No sir; I have not.
Q. Did you ever see Mr. Busbee there?
A. No sir; not to my knowledge. He might have been there and I not know him.
Q. You don't know him?
A. No sir; I don't know him.
Q. Was this banking-house of the Schafers a partnership?
A. Yes sir.
Q. It wasn't an incorporated company?
A. No sir; a partnership—two brothers.
Q. What was the style of the concern?
A. Schafer Bros.
Q. How long has that concern been doing business under that style?
A. About 40 years—42 years.
Q. All the time in this city?
A. Yes sir.
Q. What race of people do they belong to; the Hebrew?
A. Hebrew race, yes sir.
Q. They are citizens of New York?
A. Yes sir.

Q. Did this firm of Schafer Bros., or either of the firm, individually, ever do any business in South Dakota?
A. Not to my knowledge.
Q. Did they ever live there?
A. Not to my knowledge.
Q. Did you ever know one of them to go there?
A. No sir.
Q. Do you know whether they had any kinfolks there?
A. Not to my knowledge.

92 Q. Did the firm of Schafer Bros., or either of the firm, have any property in South Dakota that you knew of?
A. No sir.

Q. Did you ever know of either of these gentlemen of Schafer Bros. donating bonds to any other State except South Dakota?
A. I never heard of them donating any bonds to anybody.
Q. You did hear that they donated some to South Dakota, didn't you?
A. I did not.
Q. You never did hear of that before?
A. No sir.
Q. Did they sell any to South Dakota?
A. Not to my knowledge.
Q. When did you first hear that South Dakota had any of these bonds that the Schafers used to own?
A. About three or four months ago there was an article in the paper, I think it was the Evening Post. Mr. Schafer stated in regard to the appointment of something in—I don't know what it was—in the court, and he asked me what I thought about it. I think it was the appointment of this commission. Mr. Simon Schafer said there was a suit brought by the State of South Dakota and they had some of these bonds that he spoke about, and asked me what I knew about it. I told him I didn't know anything about it. I didn't pay much attention to it, and it didn't impress it upon my mind at that time.
Q. Didn't he say that if that suit was successful he would get his money on the bonds.
A. That he didn't say.
Q. He didn't say that?
A. No sir.

93 Q. You have told everything you know about this, have you, Mr. Gibson?
A. Yes sir.

(By Mr. PECKHAM:)

Q. Did you ever see Mr. Rothschild vote in the State of New York?
A. No sir.
Q. Where is Mr. Schafer now?
A. He is over in the office.
Q. Is he sick?
A. No sir.

Q. What is his age?
A. About 62 or 63.
Q. There is nothing to prevent his being here to be examined, is there?
A. No sir; not that I know of.
Q. Where is Mr. Salter?
A. I don't know.
Q. When did you see him last?
A. About two weeks ago, or three; about two or three weeks ago.
Q. What is his age?
A. He is about the same—over seventy, I guess.
Q. Is he in good health?
A. Then in good health.
Q. There is nothing to prevent his being here to be examined, that you know of?
A. Not that I know of.

Counsel on behalf of State of North Carolina request that the two witnesses, Mr. Samuel M. Schafer and Charles Salter, who were to be examined under the notice under which this deposition is taken, be tendered for cross-examination by counsel for the State of North Carolina.

Counsel for State of South Dakota remarks that he is not in possession of either of the gentlemen referred to, and consequently cannot tender them, but that he has no objection to counsel for the State of North Carolina securing the attendance of those gentlemen and examining them to their satisfaction.

94

WILLIAM H. GIBSON.

Subscribed and sworn to before me this 10th day of September, 1902.

RUSSELL LUCAS,
Commissioner.

SIMON ROTHSCHILD, a witness produced on behalf of the complainant, being first duly sworn, deposes and says in answer to the interrogatories propounded to him by Mr. Peckham, of counsel for complainant, as follows:

Q. You are one of the defendants in the suit in the Supreme Court of the United States, where The State of South Dakota is complainant and The State of North Carolina and others are defendants, are you not?
A. I am.
Q. And you were served with process and bill?
A. Yes sir.
Q. Will you tell us whether you are a citizen of the State of New York, or not?
A. I am a citizen over forty years.
Q. Naturalized or natural born?
A. Yes sir; naturalized.

Q. Do you own some of the first-mortgage bonds of the State of North Carolina?

A. Yes.

Q. When you call them first mortgage, you mean first
95 mortgage on certain stock?

A. I own some of the six per cent. bonds.

Q. About how many, approximately?

A. Only a few.

Q. Did you own them at the time of the commencement of this suit?

A. Oh, I owned them for God knows how long.

Q. For a perior prior to the commencement of this suit; for more then six years, say?

A. More than 15 years I think. I don't know how long. Ever so many years.

Cross-examination by Mr. MERRIMAN:

Q. What amount of bonds do you own?

A. I own where those ten shares are on. Of those bonds I own sixteen.

Q. Of what denomination?

A. A thousand dollars each. I think they are a thousand dollars each.

Q. Do you know whether they are the first or the second?

A. Well, those are those bonds where the ten shares of stock is onto them. I don't know what you call them.

Q. Do you mean to say that the shares of stock are attached to the bonds?

A. No; I think they are stamped on them, if I am not mistaken.

Q. Did you ever see a certificate of stock in the North Carolina Railroad Company?

A. I only seen those bonds which are stamped on with those ten shares of stock; where they say, "The State of North Carolina guarantee" on those bonds—those ten shares of stock.

Q. Do you know the date of your bonds?

A. No sir; I do not.

96 Q. Suppose you look at that certificate and see if your bonds have that certificate (handing witness Exhibit A to bill, on pages 15, 16 and 17 thereof)?

A. That is it, where those ten shares are on; that is the bond.

Q. The bonds you hold are just like that?

A. Yes sir.

Q. Could you fix about the day that you got them; could you fix the date at which you purchased them?

A. Oh, I couldn't tell you that; it is so many years ago.

Q. Since the war, since 1865?

A. I couldn't tell you unless I see in my book; I couldn't tell the year.

Q. Whom did you get your bonds from?

A. I think I bought them through Schaeffer Bros. at the exchange, the same as I buy any other securities.

Q. What did you pay for them?
A. I couldn't remember that, unless I find out in my book.
Q. You didn't pay much for them, did you?
A. I paid a good deal for them, because we expected to get a hundred cents on a dollar at that time, a very short time afterwards. They were high at that time, when I bought them, but I don't remember how much I paid for them.
Q. Are these sixteen bonds that you speak of all that you hold against the State of North Carolina?
A. Yes; that is, of that kind. I own those six per cent. bonds beside, where they pay the interest regular.
Q. You own sixteen of the kind mentioned in this bill of complaint?
A. Yes sir.
Q. And you own some other bonds beside?
97 A. I own some other bonds which they pay at six per cent. now.
Q. Couldn't you tell about the time when you purchased these sixteen from Schafer?
A. No I couldn't tell; it is so many years ago.
Q. You know the Schafers very well?
A. Of course I do.
Q. What amount do you hold of the six per cent. bonds?
A. Only a few.
Q. Could you give about the amount?
A. Only a few thousand.
Q. Is that the nearest you can come to it?
A. Yes.
Q. You are quite certain that you own sixteen of these second bonds?
A. I am.
Q. Don't you know how many you own of the others?
A. I told you I guess I own two.
Q. Two thousand dollars?
A. Yes sir.
Q. When did you get those?
A. I don't know. They gave me a new bond for the old ones at that time. I don't know how long.
Q. You never got any new bonds for the sixteen seconds?
A. No sir. If they would have given me six per cent. for the others I would have took it.
Q. When did you first hear about the suit between the State of South Dakota and the State of North Carolina?
A. I seen it in the paper.
Q. Was that the first intimation you had of such a suit?
A. Yes.
98 Q. When was that?
A. My dear sir, I can't remember, I seen it in the newspaper; I don't know when.
Q. Has it been six months ago?
A. I think so; I think it must be more than that.

Q. Did you talk to either of the Schafers about it?
A. No.
Q. Did you ever hear either of them speak of the suit at all?
A. Not that I recollect.
Q. You have never put in any answer to this bill, have you?
A. What bill?
Q. This bill of South Dakota against the State of North Carolina?
A. No sir.
Q. Have you ever employed counsel in the case?
A. I gave my—I have no counsel for them.
Q. What was it you were going to say you gave?
A. My stock is down at Schafer Bros., and I gave it to them.
Q. For what?
A. My bonds.
Q. What for?
A. I left my security with them for collection.
Q. Did you understand from them that they were going to collect it from the State of North Carolina?
A. They said for the last ten years they wanted to collect it from the State.
Q. When did you give your bonds to them to be collected?
A. From the beginning, when I bought them through them. They have got them ever since. I have some securities with them now for ten or fifteen years sometimes.
99 Q. Have you been in any way connected with this suit except as your name appears here as a defendant?
A. That is all.
Q. Did you ever agree to pay counsel in it at all?
A. I left that all in Schafer's action.
Q. What did you say to them about that?
A. Nothing at all. Whatever he does I am satisfied.
Q. And that agreement you say was made ten years ago?
A. I don't know when that agreement was made. I have no agreement with Mr. Schafer. I left my securities with him when he bought them, and I paid for them, and I have them there ever since.
Q. You have never had them in your possession at all?
A. Oh, yes; and then I put them back again, because I went to Europe, several times.
Q. When did you put them back with Schafer, the last time?
A. Some years ago.
Q. How many years ago?
A. How many I could not tell so I went to Europe; it must be ten or twelve years ago the last time I went to Europe.
Q. Have you not had your bonds in your possession during the last ten or twelve years?
A. No; I got some things there, laying there longer than that, with them.
Q. Have you not talked with either of the Schafers about them in the last year or two?

100 A. I spoke with Simon—who died.
Q. When?
A. Last winter, when we were down in Atlantic City.
Q. What did you talk about there?
A. I only asked him about don't we get our money back from the State of North Carolina? "Well," he said, "it is in suit now; I can't tell you."
Q. Simon Schafer told you that?
A. Yes.
Q. Then you had heard about the suit before you saw it in the newspaper, hadn't you?
A. That was this spring, when I seen him there in Atlantic City.
Q. You knew about the suit before that?
A. I seen it in the paper.
Q. Do I understand you to say that you knew nothing about this suit until you saw it in the newspaper?
A. From that time on I know it.
Q. Didn't they serve a paper on you to make you a defendant in the case?
A. That was about the time I suppose.
Q. Then the first time you heard of it was when they served the subpœna on you, wasn't it?
A. I suppose so; yes.
Q. What did you learn about it then?
A. Nothing at all, with the exception that the suit is on; that is all.
Q. When you were served with the subpœna didn't you take the pains to find out what it was all about?
A. Well, I don't remember how that occurred, when that subpœna came. I don't remember any more what I read at that time.
Q. You are not certain it was served on you, are you?
A. Yes; that I remember.
Q. What did you do?
A. I couldn't recollect nothing with the exception it was served on me; that was all.
101 Q. Didn't you go to see somebody about it?
A. Only Mr. Simon Schafer.
Q. What did he tell you about it?
A. Well, he can't tell nothing about it at all until it comes on.
Q. What did he have to do with it?
A. Why, they own some bonds themselves, the same as I do.
Q. Did he tell you anything about giving his bonds to South Dakota?
A. Not that I know of. No, he never said anything to me about that. I never heard of that neither.
Q. You never heard that he gave bonds to South Dakota?
A. No sir.
Q. Did you read this bill in the case of South Dakota against North Carolina?
A. I am not sure whether I did or not; I couldn't remember.
Q. Did you see a copy of it?

A. I can't recollect.

Q. Haven't you got a lawyer that you consult about your business affairs?

A. Sometimes I do and sometimes I haven't.

Q. Did you consult one about this particular matter?

A. No.

Q. You didn't read what was in this bill, that you know of?

A. I don't recollect.

Q. You have given yourself no concern about it at all, have you?

A. Not a great deal. I let it go the way it goes. I left it in the hands of Mr. Schafer.

Q. Did he tell you he would take care of your interest in it?

A. When I went to Europe I always gave him my bonds, and he would take care of it, and take interest in my bonds. Of course he would.

Q. Did he tell you he would take care of your interest in this suit?

102 A. Why, he takes care of my interest in the bonds and in thesuit, no doubt.

Q. Did he tell you that?

A. No; he didn't tell me that, because he knows very well that when I went to Europe every year, and he acts for me the same as I can for myself.

Q. When did you go to Europe last?

A. Ten or twelve years ago.

Q. Did you understand, when this subpœna was served upon you, that Mr. Schafer would attend to your interest in it?

A. I understood that Mr. Schafer will take care of my bonds whatever he does for him he does for me.

Q. Have you any interest in his bonds?

A. No sir.

Q. You are not a partner of his?

A. No.

Redirect examination by Mr. PECKHAM:

Q. You were speaking of being the owner of two sets or two classes of bonds?

A. Yes sir.

Q. And the class whereon there are now paying the interest, of that class of bonds how many bonds do you own?

A. I think I have got two.

Q. They are bonds of the State of North Carolina?

A. Yes; that was an old bond, and they gave an extended one, a six per cent. bond, on which they pay the interest now right along.

Q. Are the new bonds six per cent. bonds, too?

A. Yes sir; they have always paid the interest since they exchanged them.

Q. You got those bonds by exchanging for them other bonds of the State of North Carolina?

A. They called in the old bonds, so far as I can recollect,
103 and issued those new bonds, for which they paid the interest on it, and then they issued these new bonds for it.

Q. And those two bonds you still have?
A. Yes.
Q. Where are those two bonds?
A. I have got them in my box.
Q. In your office?
A. Yes.
Q. Can't you get them and produce them here?
A. Yes.

SIMON ROTHSCHILD.

Subscribed and sworn to before me this 10th day of September, 1902.

RUSSELL LUCAS,
Commissioner.

Adjourned to Tuesday, September 9, 1902, at 11 a. m. at the same place.

STATE OF SOUTH DAKOTA
vs.
STATE OF NORTH CAROLINA ET AL.

NEW YORK, *September* 9, 1902.

(Met pursuant to adjournment, with same appearances as at last hearing.)

Mr. SHEPHERD: Mr. Charles Salter having been noticed as one of the persons who would be examined in behalf of the complainant, and complainant's counsel having, upon request, declined to produce said Salter for cross-examination, and the State of North Carolina still protesting (through its counsel) against the jurisdiction of the court as to the subject-matter herein, proceeded to the examination of said Salter.

104 Mr. PECKHAM: Counsel for the complainant understands that Mr. Salter is called to the stand by the State of North Carolina, or its counsel, and makes no objection to such proceeding.

Mr. CHARLES SALTER, a witness produced by the defendant State of North Carolina, being first duly sworn, deposes and says in answer to the interrogatories propounded to him by Mr. Rountree, of counsel for said defendant, as follows:

Q. Do you remember when this suit of South Dakota against North Carolina was commenced?
A. No sir. As a matter of fact, really I know nothing about the suit.
Q. You don't know when this suit was commenced?
A. No sir.
Q. And you say you don't know anything about the suit?
A. No sir.

Q. Do I understand you to say that you don't know anything about the suit; you are certain of that?

A. Well, as we say we know a thing. I have heard of it, but that is all.

Q. So we understand you to say that you have very little intimate knowledge about this suit?

A. Yes sir.

Q. The summons or subpœna was served upon you, wasn't it?

A. Yes sir.

Q. You remember, of course, the time it was served upon you?

A. Yes sir.

Q. Now, what did you do when it was served upon you?

A. Well, I went down to Washington to hear what they had to say, but I wasn't called upon to say anything.

Q. You went to Washington?

A. Yes.

Q. Did you consult any counsel about the matter after you
105 were sued?

A. Yes sir.

Q. Will you tell us who it was?

A. I saw Judge Russell there in Washington, and had a conversation with him.

Q. That was after you were sued?

A. After the subpœna, yes sir.

Q. Had you seen Judge Russell before that time?

A. I have seen Judge Russell, and had some acquaintance with him for some years. I corresponded with him some years ago in reference to another class of North Carolina bonds.

Q. Was it while he was governor, or since?

A. He was governor.

Q. He was governor then?

A. Yes.

Q. What class of bonds?

A. The funding-act bonds.

Q. How many were there?

A. I think about 15 of those bonds, 1866 and '68.

Q. How many were there, you say?

A. I think about 15. I have got the bonds still. I have never taken any such offers as the State of North Carolina proposed to me. In 1866 they told me they would pay the interest, and after paying one or two years they laid down and did nothing until they came on in 1879 and offered me 15 cents in a four per cent. bond, which I never would accept.

Q. The bonds that you are now speaking about are not the bonds that are mentioned here in this suit, are they?

A. No; this is a different class of bonds; this bond having an endorsement that ten shares of stock of the North Carolina Railroad Co. was pledged as security, and I looked upon that as some day they would have to pay them.

106 Q. So the bonds you were speaking of a little while ago—the 16 or 17 bonds you were speaking of—were not the bonds that are mentioned here in your answer?

A. No sir.

Q. Did you see Governor Russell and have any conference with him about these bonds?

A. Well, nothing particular. I went down there. I was summoned to go, and I got away from there as soon as I could get away, because I was anxious to get back home.

Q. Hadn't you had some conference with him before you went to Washington about these bonds?

A. No; I don't think so. This matter I put with Schafer Bros. some years ago and left it to them.

Q. You didn't undertake then to control any part of this litigation?

A. Not at all, no sir.

Q. And you left it entirely with Schafer Bros.?

A. Yes sir.

Q. And you have done in this matter exactly what they have told you to do, haven't you?

A. Well, I haven't had any instructions from them.

Q. Didn't you file an answer?

A. Oh, that was from the court.

Q. Who suggested the employment of Governor Russell?

A. Well, that was Schafer Bros.

Q. They suggested the employment—Schafer Bros.?

A. Yes sir.

Q. And Governor Russell, then, he prepared this answer for you, didn't he?

A. I presume so. As I say, the matter was left entirely to Schafer Bros. I don't pretend to say anything about it, being a small holder.

107 Q. Didn't you employ Governor Russell as your attorney in this case?

A. As I say, I had nothing to do with the matter. If I put the matter in Schafer Bros.' hands for a settlement, why that is sufficient I should say.

Q. You filed an answer in this case. You remember that, don't you (handing witness paper)?

A. Well, that looks reasonable to me, if Governor Russell suggested to me I should do such a thing, if Governor Russell asked me to sign such a paper, that I should do it.

Q. So, if you signed this paper, you did it at the instance of Governor Russell?

A. Yes sir.

Q. And he was the attorney of Schafer Bros., was he?

A. Yes sir.

Q. And you left this matter entirely with Schafer Bros.?

A. Yes sir.

Q. To control and manage as they saw fit?

A. Yes.

Q. You haven't paid any counsel, have you, any fees?

A. No sir.

Q. And Governor Russell, then, is not employed directly by you, but by Schafer Bros.?

A. Yes sir.

Q. Have you had any conference with Governor Russell, about the filing of this answer, or about this suit?

A. No sir; I haven't seen Governor Russell since I was at Washington last spring.

Q. What occurred between you and Governor Russell there; what was the conversation, in substance?

Counsel for complainant objects to the question.

A. Well, I don't remember.

Q. Well, did you regard any conversation you had between Governor Russell and yourself as a matter of confidence at all; it was not confidential, was it?

108 A. No; I didn't think it was.

Q. Will you please tell what it was.

Counsel for complainant objects to the question.

Counsel for the State of North Carolina insists that this is a personal privilege of the witness, who has stated that it was not a confidential conversation.

Complainant's counsel states that he still insists upon the objection, that the statements of Governor Russell are immaterial and incompetent and mere hearsay, and the conversation is quite immaterial.

Q. Now, please answer the question, what it was, what the conversation was.

A. Well, really I couldn't say anything.

Q. So you had a conversation with him about the bonds—about this suit?

A. I had a conversation to the effect that he wanted me to be there in case of being called, that is all. As soon as I got away from there I left town.

Q. You went there; you saw him there?

A. I saw Judge Russell.

Q. What occurred between you and Governor Russell when you got there?

A. I went up to the court with him, and I danced around there for some time, and finally I got permission to go home.

Q. Did he say anything about the suit to you?

A. Nothing special, no.

Q. Did he say anything generally to you, about the suit?

A. I don't think he did.

Q. So then, you had a conversation with him about the

109 suit, and you can't recall anything he said about it?

A. I told you that the conversation was not about the suit, but in case my testimony was called upon that I should be there and I was ready; that is all.

Q. Did he tell you about South Dakota having sued the State of North Carolina?

A. I do not think there was anything said about that; not to my recollection.

Q. Before this suit was brought, before you were served with the subpœna, had you had any conversation with Governor Russell about this matter—these particular bonds?

A. Not that I remember.

Q. Did you have any conversation with Mr. Ricaud about it, Mr. A. G. Ricaud.

A. I don't think so; not to my recollection.

Q. Did you have any with Mr. Peckham about it, Mr. Wheeler H. Peckham?

A. No sir. I never saw Mr. Peckham, until this morning.

Q. I see signed to your answer here, as attorney for you, Mr. Alfred Russell; did you employ him?

A. I did not. I told you that this matter was entrusted to Schafer Bros., entirely.

Q. And they employed a counsel?

A. Yes sir.

Q. And they are managing this whole business, aren't they?

A. Yes sir.

Q. How many bonds have you?

A. 15.

Q. Of this class?

A. Of this class, yes sir.

Q. What we call second-mortgage bonds?

A. Yes sir.

Q. Could you give us the number of those bonds?

A. I haven't it with me, no.

Q. You could furnish it, couldn't you?

A. Certainly

110 (The witness afterwards produced the numbers of the bonds referred to as follows: 5975, 6029, 6059, 5967, 4235, 4248, 4582, 5533, 5532, 6226, 6225, 5966, 5638, 5636, 4299.)

Q. How long have you had those bonds?

A. Well, sir; I have had them more than thirty years.

Q. Do you remember who you bought them of?

A. No sir; I bought them through a broker. I bought them in Wall street, I don't know from whom, like all those bonds. I couldn't tell you. I have had South Carolina bonds and North Carolina bonds.

Q. You say here, in this answer, Mr. Salter, that if you can't have your bonds collected you want this suit dismissed; how about that; do you know anything about saying anything like that?

Counsel for complainant objects to the question on the ground that the answer of the witness is not shown to him.

Counsel for the State of North Carolina hands to the witness a certified copy of the answer of Mr. Salter.

A. Well, I presume that is correct.

Q. Is that what you want. You want this suit dismissed if you can't collect your bonds, is that what you want?

Mr. PECKHAM: Objected to as wholly immaterial; the pleading is the evidence of what he wants, and surely you can't ask the witness sitting here as to what he wants outside of that.

111 Counsel for the State of North Carolina state that they will not press the question inasmuch as it is objected to by counsel for the complainant.

Cross-examination by Mr. PECKHAM:

Q. Are you a citizen of the State of New York?
A. I am, sir.
Q. Natural citizen; that is, were you born here?
A. I was born here.
Q. And have lived here ever since?
A. Yes sir. I was born in the city of New York in 1827, 30th of April.

CHARLES SALTER.

Subscribed and sworn to before me this 10 day of September, 1902.

RUSSELL LUCAS,
Commissioner.

Mr. SIMON ROTHSCHILD, a witness called at the last hearing, produces one of the two bonds to which he referred in his testimony at said hearing, the same is handed to the commissioner, and a copy thereof made and certified to by the commissioner to be a copy of the bond so produced.

Redirect examination by Mr. PECKHAM:

Q. Do you remember, after the bill in this case, or the subpœna was served on you, going to any bank with reference to it?
A. Yes, sir.
Q. What bank?
A. I think it was the First national bank. I have forgotten the name of it.
Q. With whom did you go?
A. I went with Mr. Gibson.
Q. What occurred there?

112 Counsel for State of North Carolina object to conversation that took place between Mr. Rothschilds and the bank.

Q. I asked the gentlemen if they pay out the coupons for those bonds, and he said yes. I asked them then if it wouldn't be advisable to let the bondholders all know about the bond, and he said, "Well, we only pay the coupons, and that is all we do," and then I left and left the paper there.
Q. Left what paper there?

A. Just a memorandum he wanted to have that I was there; that is all.

SIMON ROTHSCHILD.

Subscribed and sworn to before me this 10th day of September, 1902.

RUSSELL LUCAS,
Commissioner.

SAMUEL M. SCHAFER, a witness produced by the defendant State of North Carolina, being first duly sworn, deposes and says in answer to the interrogatories propounded to him by Mr. Rountree, of counsel for said defendant, as follows:

Mr. ROUNTREE: Mr. Samuel Schafer, having been noticed as one of the persons who would be examined in behalf of the complainant, and complainant's counsel having, upon request, declined to produce said Schafer for cross-examination, and the State of North Carolina still protesting (through its counsel) against the jurisdiction of the court as to the subject-matter herein, proceeded to the examination of said Schafer.

Mr. PECKHAM: Counsel for the complainant understands that Mr. Schafer is called to the stand by the State of North Carolina, or its counsel, and makes no objection to such proceedings.

113 By Mr. ROUNTREE:

Q. Where do you live?
A. 52 West 46th street, in the winter.
Q. In the city of New York?
A. In the city of New York.
Q. What is the name of your firm?
A. Schafer Bros.
Q. Who were the partners?
A. My brother and myself.
Q. What was your brother's name?
A. Simon.
Q. Do you and your brother own any of these bonds upon which the State of South Dakota is suing the State of North Carolina?
A. My brother owns some, and the firm owns some.
Q. How many does your firm own?
A. Well, I couldn't tell you exactly; in the neighborhood of 100 I guess. I couldn't tell you exactly from my mind.
Q. Haven't you got the list of those bonds with you?
A. No sir.
Q. How many did your brother own?
A. He owned I believe thirty or forty thousand, individually.
Q. Thirty or forty of the bonds; they are a thousand dollars each, aren't they?
A. A thousand dollars each.
Q. And the firm owns the balance, that are owned by you and your brother?
A. Yes sir.

Q. You don't own any individually?
A. No sir.
Q. When was the last time you or your brother acquired any of these bonds?
A. I couldn't remember that; it must be a great many years ago.
Q. A great many years ago?
A. I think so; yes sir.
Q. Didn't you acquire some of these bonds—eight of them—within the last year or two, from a man named Lich-
114 tenauer?
A. I did not.
Q. Did your brother buy any?
A. I think my brother did.
Q. When was it he bought them?
A. I can't tell you exactly that. It may be two years ago.
Q. Have you seen those bonds?
A. I don't remember having seen them. My brother made the transaction.
Q. I asked you whether you had seen the bonds.
A. I don't remember that I saw them; I might have and might not; I can't think of that.
Q. Don't you know that those eight bonds which your brother purchased from Lichtenauer were canceled?
A. No, I don't remember that.
Q. Can you produce those bonds in court, so that we can see them?
A. I haven't got those bonds that I know of.
Q. Who has control of those bonds now?
A. I do not know.
Q. Who is the administrator of your brother, or executor?
A. The executor, I have just sent the papers to the surrogate, I expect to be—I believe I am the administrator—I mean executor. I haven't received my papers yet. My brother only died three or four weeks ago, and I am not quite over the shock yet.
Q. In the meantime who has control of these bonds?
A. I don't know anything about who has got control of these bonds you refer to. I have got the control of my brother's bonds, and I haven't seen them since his death, and have never looked after them. I didn't think there was any necessity for looking them up.
115 Q. You have never seen those bonds, then?
A. I can't positively state whether I did or did not.
Q. You know your brother bought those bonds from Mr. Lichtenauer?
A. I think he did. I am not positive on that point. You see my brother attended to this affair. I attended to the internal part of the business, and my brother made it his business to attend to this part. I attended to the business of the office, and he used to buy in the board and attend to outside business, you know.
Q. Did you see any correspondence from Governor Russell of

North Carolina with your brother, or your firm, or you, with reference to these bonds held by Mr. Lichtenauer?

A. When was that; when do you refer to; lately?

Q. Well, to be accurate about it, it occurred on October 24, 1900?

A. I don't remember. Maybe my brother attended to that all. I am pretty positive he attended to that.

(By Mr. PECKHAM:)

Q. Answer the question?

A. No; I don't remember.

Q. You don't remember?

A. No sir.

Q. Didn't you see the correspondence usually which your brother had with Governor Russell, with reference to the collection of these bonds?

A. No sir, he never would—he attended to that business himself, he preferred; that is his part; he was going to attend to it. If there was any such correspondence or anything, he attended to it, and if he did I couldn't very well answer what it was or what it was not.

Q. Have you got the book of correspondence between your brother and Governor Russell, or any other parties in North Carolina,
116 with reference to these bonds, from the first of January, 1900, to the first of May, 1901?

A. No; I didn't keep those things. Those books are in the office. I may hunt it up. I haven't got those books. I don't know anything about it. That is detail work, you know, for office boys.

Q. You don't know whether they are there or not?

A. I don't know whether they are there or not.

Q. Will you make an examination and see whether you have got such correspondence, and let me know?

A. Yes sir.

Q. And produce it?

A. Yes; if I have got it. I don't know whether I am here alone, or on advice——

Q. You are here as a witness now?

A. Will I produce them? Yes, if I can find them.

Mr. SHEPHERD: We ask you to produce the correspondence which took place between your brother and Governor Russell during the time which I mention, or with your brother and any other persons in North Carolina with reference to any of these bonds, upon which the State of South Dakota is suing the State of North Carolina including the eight bonds purchased by your brother from Mr. Lichtenauer.

The WITNESS: If there is such. I do not know whether there is such correspondence.

Mr. PECKHAM: I object to such request being made to the witness, because it assumes that the State of South Dakota is suing upon the bonds referred to outside of the ten bonds mentioned in the bill.

Q. How long would it take you to make an examination
117 and produce this correspondence, whatever it may be?

A. How long would it take me to produce it? First of all, it may take me some time to look for them, and consequently I might not be able to produce them. I have to find them first.

Q. *Precisely. How long would it take?*

A. This is an inopportune time. I am in active business around here and I came over here and am all alone—not all alone—but am absent quite suddenly, and I live out of town and leave at 3.45 in the afternoon, so I wouldn't have much time to do this, to produce them today.

Q. Will you produce them tomorrow?

A. I will hunt up the papers that your refer to, and if I find them I will produce them.

Q. You say your brother managed this matter particularly, and not you?

A. Yes sir, and not I.

Q. He is, unfortunately, dead?

A. I am sorry to say.

Q. How long have you had any of these bonds?

A. Those bonds are in our possession, and in his possession, oh, I guess 30 years; over that, if my memory serves me.

Q. Has any interest ever been paid on those bonds, to your knowledge?

A. I don't remember that.

Q. Don't you know very well that it hasn't been paid?

A. You ask me any interest.

Q. Paid you, I said.

A. Paid me? No; not that I know of.

Q. Has it been paid to anybody else, within your knowledge?

A. Not that I know of.

118 Q. You can't fix more definitely the time of purchase of those bonds?

A. Well, 25 or 30 years, in that neighborhood. I can't fix the exact time more definitely just now. If you give me a chance to think over it I might.

Q. Do you remember whether you had them on the first of January, 1870?

A. I think we had.

Q. You filed a petition to the legislature of North Carolina in 1901, asking for the payment of these bonds, didn't you?

A. My brother must have done that, if it has been done.

(By Mr. PECKHAM:)

Q. Won't you please pay strict attention to what the counsel asks, and answer the question only?

A. I don't remember.

Q. You don't remember whether your brother, on behalf of you and himself, and through a lawyer by the name of F. H. Busby, filed a petition which was presented to the legislature of North Carolina in 1901, asking for the payment of those bonds?

A. No sir; I don't remember that.
Q. Did you ever see any correspondence between your brother and Mr. Busby about that?
A. No sir.
Q. Do you know Mr. Busby?
A. No sir.
Q. Did you ever see him?
A. I might have seen him once. How many years ago I don't remember. I don't remember him, it is so long ago.
Q. Do you know whether or not, while Governor Russell was the governor of North Carolina, your brother and he had
119 any correspondence on behalf of himself and the firm, either or both, with reference to collecting these bonds?
A. Not that I know of.
Q. Did Governor Russell, between the 1st day of January, 1895, and the 1st of January, 1901, come into your office?
A. I think he has. Only the other day he came over accidentally.

(By Mr. PECKHAM:)

Q. The first of January, 1901, wouldn't be the other day. Between the 1st day of January, 1895, and the 1st day of January, 1901, that is the question?
A. I didn't know the gentleman in 1895.
Q. Did you know him before the 1st day of January, 1901?
A. I think I did.
Q. When did you get to know him between these two dates?
A. I was introduced by Mr.—I never knew the gentleman before I was introduced by Mr. Ricaud.
Q. When?
A. I can't state exactly.
Q. Was it before the 1st day of January, 1901?
A. It must have been around that neighborhood, about a year and a half ago, something like that; about a year.
Q. I asked you whether you were introduced to Mr. Russell by Mr. Ricaud prior to the 1st day of January, 1901?
A. I don't believe I know the gentleman more than a year and a half. That isn't prior; that is after 1901. I can't tell you exactly, my dear sir. It didn't strike me to remember it at all.
Q. When did you employ Governor Russell in this suit?
A. I didn't employ anybody.
120 Q. You didn't employ anybody?
A. No, sir; my brother had arrangements with Mr. Ricaud.

(By Mr. PECKHAM:)

Q. Won't you just answer the question?
A. Well, I didn't employ Governor Russell.
Q. Did you employ any counsel?
A. No, sir.
Q. Did your brother employ any counsel?
A. For what purpose?
Q. For the purpose of collecting these bonds for a portion of

which the State of South Dakota is suing the State of North Carolina?

A. I don't know whether he did.

Q. You never heard him say?

A. The only introduction I had was my brother introduced me to Mr. Ricaud; that is all I know.

Q. Your brother introduced you to Mr Ricaud?

A. Yes, sir.

Q. When was that?

A. About a year and a half ago, I guess, or two years.

Q. Can't you be more accurate than that. When did you first meet Mr. Ricaud?

A. I don't think it is much more than a year and a half, or two years.

Q. Did you meet him in the year 1900?

A. I can't state that exactly. I can't tell it exactly.

Q. Did you know Mr. Ricaud or Governor Russell, either or both, before this suit by the State of South Dakota against the State of North Carolina was brought?

A. Well, I know very little about the suit of those two States. I told you that my brother attended to all the affairs before,
121 and I don't remember.

Counsel for complainant asks to have the answer stricken out as not responsive.

Mr. SHEPHERD: I prefer you to answer as you think proper, and not to be restricted. You answer as you want to answer.

Q. That is the nearest you can come to answering my question. State whether you had any conversation or heard any conversation between your brother and Mr. Russell or Mr. Ricaud with reference to the collection of these bonds before the suit was brought by South Dakota against the State of North Carolina?

A. I know nothing about the suit. I don't understand the question.

Q. I will try to make it plainer. Did you participate in any conversation with Judge Russell, or Mr. Ricard, about the collection of these bonds, before October, 1901?

A. Which bonds do you refer to?

Q. I refer to the bonds on which the State of South Dakota is suing the State of North Carolina?

A. No sir.

Q. I mean the same class of bonds, and not the particular bonds on which the State of South Dakota has brought this suit?

A. I haven't heard any conversation, to my knowledge; I don't remember it.

Q. Did you participate in any conversation, or were you present where any discussion took place about collecting any bonds
122 from the State of North Carolina which you were interested in?

A. I might have been off and on in the office, and I might have

been. I only was going to state that I attended to my business in the office, and my brother attended to his. He might have been in and out, and everything like that, I wouldn't know it.

Q. That might have happened then during the year 1900?

A. No sir; that is two years ago.

Q. There could not have been, then, any conversation in your office, or discussion with reference to collecting the second-mortgage bonds of the State of North Carolina during the year 1900, which you heard?

A. I can't be positive to answer that question. I couldn't answer that. I forget. I don't forget; I don't know; I can't remind myself two years back what was done and what wasn't done.

Q. Haven't you and your firm regarded these bonds of North Carolina as rather an important matter?

A. I didn't; my brother did.

Q. And that is the reason that you didn't charge your memory with it?

A. That is one of the reasons, yes.

Q. When did you give those bonds to the State of South Dakota?

A. I didn't give any bonds to the State of South Dakota.

Q. When did your brother give them?

A. That I don't know; it must have happened some time when I was absent.

Q. Did he give your brother's individual bonds, or did he
123 give the bonds of the firm?

A. His individual bonds.

Q. Did you hear him discussing with any lawyer, or any one else, anything about giving any bonds to the State of South Dakota?

A. No sir.

Q. Where were you in the year 1900?

A. Well, what time of the year was it?

Q. The whole year?

A. Oh, I am most of the time in my office.

Q. You were not in Europe or elsewhere?

A. I am out of town sometimes in the summer. No, I wasn't in Europe.

Q. Where were you in the month of September, 1900?

A. Well, some days I stay at home in September. My birthday gets around there and I stay at home and take a vacation for a week or ten days.

Q. What part of the month of September does your birthday come in?

A. On the 12th. It is coming this week again.

Q. You don't commence to celebrate before the 12th, do you?

A. I take a little vacation. I stay home sometimes a few days before and sometimes a few days after.

Q. You didn't know that your brother gave the State of South Dakota any bonds, did you?

A. No sir; I did not.

Q. You never heard him say anything about it?

A. Oh, afterwards. I was even angry about it. I told him he

oughtn't to have done it. That was some time after, when I got back.

Q. Got back from where?

A. When I got back to the office. I can't remember where I was at that time. You asked me the question. I think I was home.

124 Q. And you hadn't heard him say a thing about giving these bonds to the State of South Dakota, nor had you heard any suggestion from anybody about giving the bonds to South Dakota until after it was done?

A. Until after it was done, yes sir.

Q. You are positive about that?

A. I am positive about that. I will swear up to that again.

Q. Do you know Mr. Robert W. Stewart of South Dakota?

A. No sir.

Q. He has never been in your office?

A. No sir; I don't remember the gentleman; I never heard the name.

Q. Did you ever read the bill in this case?

A. No sir.

Q. Did you ever see it?

A. No.

Q. You say that Mr. Ricaud introduced you to Mr. Russell?

A. Yes sir.

Q. And that that was a year and a half or two years ago?

A. Yes sir.

Q. Where was it you were introduced to Mr. Russell by Mr. Ricaud?

A. I guess it was in his office, if I am not mistaken.

Q. In Mr. Ricaud's office?

A. Yes sir.

Q. Or in your office?

A. I think it was in Mr. Ricaud's office. My brother introduced me to Mr. Ricaud. I never knew Mr. Ricaud either.

Q. How long had you known Mr. Ricaud?

A. I hadn't known the gentleman before I was introduced to him.

125 Q. How long had you known Mr. Ricaud before Mr. Ricaud introduced you to Mr. Russell?

A. May be six months or a year, I should say.

Q. Then you may have known Mr. Ricaud in the year 1899 or 1900?

A. About 1900 I should think, yes.

Q. Early part of 1900?

A. I do not know whether it was the early part of 1900. It might have been the latter part of 1900. It is around a year and a half or two years.

Q. You said you knew Russell a year and a half or two years ago, didn't you?

A. Yes; the other six months I can't tell, six months or a year, all I say is about two years.

Q. Had you had any discussion, or heard any discussion between Mr. Ricaud and your brother or yourself, with reference to collecting these bonds, or how to collect them?

A. My brother had discussions with Mr. Ricaud and I had nothing to do with it. As I said before, my brother was attending to that part of the business.

Q. About what time do you think these discussions between your brother and Mr. Ricaud commenced?

A. About two years ago.

(Mr. Ricaud, sitting by, states that he thinks it is about May, 1900, to which the witness assents.)

Q. You heard that conversation?

A. No sir.

Q. Didn't hear any of it?

126 A. I heard some of it incidentally, when they met in our office, and my brother was attending to the affairs with Mr. Ricaud.

Q. I understand that, sir.

A. But I didn't give it any attention because my brother was attending to it.

Q. What part of it did you hear?

A. That I don't remember what part I heard.

Q. Did you hear anything said about collecting these bonds through the aid of the State of South Dakota?

A. No, sir.

Q. Did you hear anything said about giving these bonds to the State of South Dakota?

A. No, sir.

Q. You are positive of that?

A. I am positive of that.

Q. That was never said at all?

A. I didn't know it at all until I got back, I told you, and my brother had presented them.

Q. And you never knew that he had the slightest intention of doing that until it was done?

A. No, sir; I did not.

Q. And you will swear to that?

A. I will swear to that.

Q. Did your brother have any financial interest in the State of South Dakota?

A. No, sir.

Q. He wasn't born or reared, or particularly interested in it, was he?

A. No, sir; he was born and reared in New York city.

Q. He has no children out there?

A. No, sir.

127 Q. Or interested in the schooling of any children there?

A. No sir; not that I know.

Q. You have charge of Mr. Salter's bonds and Mr. Rothschild's bonds, haven't you?

A. I believe they are in the office there.

Q. You know that your firm has had charge of all this matter, don't you?

A. Of all this matter—I don't know about these gentlemen's matters.

Q. On behalf of these gentlemen?

A. Not that I know of.

Q. Haven't you seen these gentlemen talking with your brother about them?

A. Yes; off and on.

Q. You say you were angry with your brother when you found out that he had given these bonds to South Dakota?

A. Well, I didn't approve of it exactly; not angry, not in the spirit you might mean it. I didn't approve of it. We didn't fall out about it.

Q. You strongly disapproved of it?

A. No; not strongly disapproved of it. I didn't have any reason to strongly disapprove of it.

Q. Then you weren't angry?

A. No; I disapproved of it. Put it that way instead of the word angry.

Q. What reason did your brother give for doing that act?

A. I don't know, sir.

Q. What reason did he give to you for doing that thing that
128 you disapproved of, to wit, giving the bonds to the State of South Dakota?

A. He never stated to me the reason.

Q. Didn't he tell you it was all right?

A. No sir.

Q. Didn't he tell you you wouldn't lose anything by it?

A. No sir; not that I remember; no sir.

Q. I wish you would try and think of that, Mr. Schafer, and tell me why it was that when you told your brother you had disapproved of the business transaction——

A. (Interrupting:) I didn't approve of it.

Q. (Continuing:)—that he didn't give you any reason at all?

A. How long ago is that now? Well, he might have said, or he did say that he thinks it would ultimately inure to his benefit, some of his bonds. I very naturally asked the question why he did it.

Q. And he said that it would inure to the benefit of your bonds?

A. No; it couldn't do no harm—no, of his bonds.

Q. Well, of his bonds; he had an interest in the firm bonds, didn't he?

A. Yes; but he gave his bonds away though. I refer to his.

Q. Are you quite certain that he didn't give an additional reason to that?

A. No sir; not that I can think of just now. No, he did not.

Q. That is the reason he gave?

A. What reason do you refer to, when you ask?

Q. The one that you have given?

A. Yes sir; the reason I have said; yes sir.

Q. You say that your brother and your firm have about 140,000 of these bonds?

129 A. I think about. I can't exactly tell. Around about that; about that amount, yes sir.

Q. Is that over and above these bonds that your brother purchased from Mr. Lichtenauer?

A. I don't know anything about those, sir. What I am stating here is about the bonds I know of.

Q. And there are about 140,000 of those?

A. Yes sir.

Q. And that is beside those that your brother gave to South Dakota?

A. I don't know whether they are in or not. There is only a difference of 10,000 bonds there. I can't tell by 10,000.

Q. Why is it when you knew about this suit you were not made party to it, having such a large interest in it?

A. What suit?

Q. The suit that we are trying now, to wit, the State of South Dakota against the State of North Carolina?

A. I didn't know anything about it.

(By Mr. PECKHAM:) I object to it. It is quite impossible for the witness to tell why the complainant does not make another man a party to the suit, and it is wholly immaterial if he knew.

Q. When did your brother become acquainted with the governor of South Dakota?

Complainant's counsel objects to the question on the ground that it assumes that the witness' brother became acquainted with the governor of South Dakota; that it does not appear that his brother ever became acquainted with him.

130 Q. Was your brother acquainted with him or not?

A. No sir; not to my knowledge.

Q. Do you know a gentleman by the name of Burke, a member of Congress for South Dakota?

A. No sir.

Q. You say you do not know him?

A. I don't know him.

Q. Did your brother know him?

A. He might have known him.

Q. Did you ever hear him speak about him?

A. No sir.

Q. You don't know a great deal about this suit, do you?

A. No sir.

Q. Have you been consulting with counsel during the progress of this case, since your brother died, as to how it is getting along?

A. What case? This Dakota case? No sir.

Q. Have you been consulting with him about the bonds—collection of them?

A. No sir; I haven't given any attention to much business since my brother died. It is only three or four weeks.

SAM'L M. SCHAFER.

Subscribed and sworn to before me this — day of September, 1902.

RUSSELL LUCAS,
Commissioner.

Adjourned to Wednesday, September 10, 1902, at 10.30 a. m., at the same place.

131 Examination of Mr. SCHAFER continued on the 10th:

Q. When we adjourned yesterday, I asked you to see if you had any correspondence between yourself or your brother for the firm of Schafer Brothers with Gov. Russell or any one else in North Carolina with reference to the collection of these bonds, on some of which same class of bonds the State of South Dakota brought suit against the State of North Carolina?

A. I did. I went over as far as I could, and I did not find any correspondence with my brother or the firm.

Q. You did not find any at all?

A. I found a letter that was addressed to my brother by Mr. Ricaud to meet him at his office, March 15, 1901.

Q. Didn't you find some correspondence between Gov. Russell and Mr. Ricaud, who was your counsel in this matter, during the month of March, or soon thereafter, in the year 1901?

A. I said I did, which I explained to you. I found a letter which Mr. Ricaud wrote to my brother, in which he asked him to call at his office.

Q. Will you produce that letter?

A. I can if I am compelled to.

Q. Do you decline to produce it?

A. I decline to produce it on the advice of my counsel.

Mr. Schafer declined to produce any correspondence which took place between Gov. Russell or Mr. Ricaud and his firm with reference to these bonds, as he claims the privilege of client a. 1 counsel.

132 A. I have no such correspondence prior to March 1901, at which time Mr. Ricaud and Gov. Russell had been retained by my brother as counsel for the firm in regard to the collection of these bonds.

Q. Mr. Schafer, do you decline to answer the question or produce the correspondence on the ground that it would tend to criminate yourself?

By Mr. PECKHAM: I object to that question on the ground that the witness suggested no such reason, and he has stated the reason that he regards the correspondence as privileged between himself and his counsel.

A. No.

Q. Have you other correspondence between your counsel and your brother in reference to these bonds written since March 1901?

A. Yes.

Q. Do you decline to produce that upon the same ground?
A. I do.

SAM'L M. SCHAFER.

Subscribed and sworn to before me this 10th day of September, 1902.

RUSSELL LUCAS,
Commissioner.

133 UNITED STATES OF AMERICA.

It is hereby certified that

THE STATE OF NORTH CAROLINA

No. 1352. No. 1352.

1000 Justly owes to —— —— or bearer, one thousand dollars, redeemable in good and lawful money of the United States, at the National Bank of the Republic in the city of New York, on the first day of April, A. D. 1919, with interest thereon at the rate of six per cent. per annum, payable semi-annually at the said bank on the first day of April and October in each year from the date of this bond, and until the principal shall be due, or surrendering the proper coupon hereto annexed. 1000

This bond is in renewal of one of a series of bonds issued under acts ratified January 27th, 1849, December 22d and 25th, 1852, and February 14th, 1855, for the construction of the North Carolina railroad, is exempt from all taxation whatsoever State, county and municipal, general and special, and is entitled to the same lien on the State's stock in the North Carolina Railroad Company to which the old bond for which this was given in renewal was entitled.

In witness whereof, the governor of the said State, in virtue
134 of power conferred by law, has signed this bond, and caused the great seal of the State to be hereto affixed, and her public treasurer hath countersigned the same at the seat of government of the said State, this first day of April, 1879.

[Seal of the State of North Carolina.]

THOS. J. JARVIS, *Governor.*

J. M. WORTH,
Public Treasurer.

Issued in pursuance of an act entitled "An act to adjust and renew a portion of the State debt." Ratified March 14th, 1879.

$30. Receivable in payment of all taxes, debts, dues, licenses. $30.

The State of North Carolina will pay thirty dollars to bearer at the National Bank of the Republic in the (73) city of New York on the first day of October 1918 on $1000 bond No. 1352.

J. M. WORTH,
Public Treasurer.

Fines and demands due the State, of every kind whatsoever.

Thirty-four coupons of like tenor and amount to the foregoing, payable semi-annually on the first days of April and October in each year, and the first thereof payable on the first day of
135 October, A. D. 1902, and the last on the first day of April, A. D. 1919, are attached to said bond.

I hereby certify that I compared the foregoing copy of bond numbered 1352 with the original thereof, and that same is a true and correct copy.

RUSSELL LUCAS,
Commissioner.

Dated: New York September 10, 1902.

136 UNITED STATES OF AMERICA, }
State, County, and Southern District of New York, } ss:

I, Russell Lucas, duly appointed by a stipulation and agreement of counsel, on file in the office of the clerk of the Supreme Court of the United States, to take testimony and depositions in the city of New York in the suit pending in the Supreme Court of the United States wherein The State of South Dakota is complainant and The State of North Carolina and others are defendants hereby certify that on the eighth, ninth and tenth days of September, 1902 at No. 25 Broad street in the city of New York, Mr. Wheeler H. Peckham appeared for the complainant and Messrs. James E. Sheperd, George Rountree and James H. Merrimon appeared for the defendant, The State of North Carolina.

That it was then and there agreed by the said counsel that the testimony to be taken should under the direction of myself be taken down by a skilled stenographer there present and should be put in typewriting. I further certify that the witnesses William Henry Gibson, Simon Rothschild, Charles Salter and Samuel M. Schafer were each by me duly sworn to tell the truth, the whole truth, and nothing but the truth and that the testimony of said witnesses was taken down by said skilled stenographer in the presence of said counsel and under my direction and was afterwards by said
137 stenographer put into typewriting and the typewriting shown to said counsel and no objection made to the same and that the said typewriting of his own deposition was then read over by each of said witnesses and each of said witnesses signed the same in my presence.

That the depositions hereto annexed are the depositions so taken typewritten and subscribed by said witnesses.

That the bond of the State of North Carolina referred to in the deposition of Simon Rothschild was offered and put in evidence by complainant's counsel and that I made a true copy of the same and of the whole thereof and that such copy is attached to the said dep-

ositions and forms a part of the deposition of said Simon Rothschild though attached at the end of all said depositions.

RUSSELL LUCAS,
Commissioner.

Dated New York city, September 10th, 1902.

138 The Supreme Court of the United States.

THE STATE OF SOUTH DAKOTA, Complainant,
vs.
THE STATE OF NORTH CAROLINA, CHARLES Salter, and Simon Rothschild, Defendants.
} No. —, Original.

Agreement of Counsel as to Depositions.

It is agreed that Mr. I. W. Goodner of Pierre, South Dakota, shall be appointed commissioner to take depositions in the State of South Dakota, the taking of said depositions on the part of the complainant shall commence on the 18th day of August, 1902, at the office of said I. W. Goodner at Pierre, S. D. Any party to this suit shall be entitled to take depositions before said commissioner on twenty (20) days' notice to the other party to this suit, or to their solicitors or counsel.

It is agreed that Mr. Russell Lucas of the State of New York, city of New York, shall be appointed commissioner to take depositions at the instance of either party in the said suit in the city and State of New York. Any party to this suit may take depositions before said commissioner on ten (10) days' notice to the other parties, stating time and place.

It is agreed that no deposition shall be taken by either party to this cause before the 15th day of August, 1902.

ROBERT D. GILMER,
Att'y Gen'l for North Carolina.
WHEELER H. PECKHAM,
Of Counsel for Complainant.
D. L. RUSSELL,
Counsel for Charles Salter.

139 Endorsed: Supreme Court, U.S. October term, 1902. Term No. 9, original. The State of South Dakota, compl't, *vs.* The State of North Carolina *et al.* Stipulation to take depositions. Filed Aug. 8, 1902.

140 Supreme Court of the United States.

I, James H. McKenney, clerk of the Supreme Court of the United States, do hereby certify that the foregoing typewritten page contains a true copy of the stipulation to take depositions in the case of The State of South Dakota, compl't, *vs.* The State of North Carolina *et al.*, No. 9, or'g'l, October term, 1902, as the same remains upon the files of said Supreme Court.

In testimony whereof, I hereunto subscribe my name
[SEAL.] and affix the seal of said Supreme Court, at the city of Washington, this 8th day of August, A. D. 1902.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

141 Endorsed: The Supreme Court of the United States. The State of South Dakota, complainant, *vs.* The State of North Carolina, Charles Salter and Simon Rothschild, defendants. Depositions of William Henry Gibson and Simon Rothschild, witnesses for the complainant, and of Charles Salter and Samuel M. Schafer, witnesses for the defendants in the above-entitled cause taken before me, and by me sealed and transmitted to the clerk of the above-named court. Russell Lucas, commissioner.

Endorsed on envelope: To the clerk of the Supreme Court of the United States, Washington, D. C. From Russell Lucas, 27 William St., New York city. The Supreme Court of the United States. The State of South Dakota, complainant, *vs.* The State of North Carolina, Charles Salter and Simon Rothschild, defendants. Depositions of William Henry Gibson, and Simon Rothschild, witnesses for the complainant, and of Charles Salter and Samuel M. Schafer, witnesses for the defendants in the above-entitled cause taken before me, and by me sealed and transmitted to the clerk of the above-named court. Russell Lucas, commissioner. Office Supreme Court of U. S. Received Sep. 13 1902. Opened in open court by order of court and filed December 15, 1902. James H. McKenney, clerk.

Endorsed: File No. —. Supreme Court U. S. October term, 1902. Term No. 9, original The State of South Dakota, complainant, *vs.* The State of North Carolina *et al.* Depositions of William Henry Gibson & Simon Rothschild witnesses for the complainant & of Charles Salter & Samuel M. Schafer for the defendants. Filed Dec. 15, 1902.

142 Supreme Court of the United States, October Term, 1901.

STATE OF SOUTH DAKOTA, Complainant, *against* THE STATE OF NORTH CAROLINA, Charles Salter, and Simon Rothschilds, Defendants.	No. 11, Original. In Equity.

Pursuant to the stipulation of counsel which has been certified to me by the clerk of the above-named court, which certify stipulation is hereto attached, I, Edward S. Battle, commissioner under authority thereof, on the 6th day of November, 1902, at the office of Robert D. Gilmer, attorney general, Supreme Court building in the city of Raleigh, N. C., proceeded to take depositions and to the examination of the witnesses in the above-entitled case as follows:

Present: J. C. L. Harris, Esq., counsel for complainant, Daniel L. Russell, Esq., counsel for defendant, Charles Salter, R. D. Gilmer,

Esq., attorney general, James H. Morrison, Esq., George Rountree, Esq., & James E. Shepherd, Esq., counsel for defendant, State of North Carolina.

143 (Defendant, Simon Rothschilds, not being present either in person or by counsel.)

It is stipulated that the testimony now to be taken shall be taken by a stenographer, written out by her, and subscribed by the witness, and it is agreed that these depositions be taken by question and answer.

MILES OSBORNE SHERRILL, State librarian, a witness produced in behalf of the complainant, being first duly sworn, deposes and says, in answer to the interrogatories propounded to him by counsel for complainant, as follows:

Q. Are you the librarian of the State of North Carolina?

A. Yes sir.

Q. Have you in your possession the files of the Raleigh Sentinel of August the 12th, 1867 and Feb. 26th 1868?

A. Yes sir.

Q. Are the files of these papers collected by the State and bound and kept in your office as a part of the records of the same?

A. That is my understanding.

Q. Mr. Sherrill, will you please examine this issue of the Raleigh Sentinel of Aug. 12th, 1867 and see if you find therein an advertisement signed by Kemp P. Battle, public treasurer and if so please read it, and the stenographer will please take it down.

A.—

"$800,000 North Carolina Bonds for Sale.

TREASURY DEPARTMENT OF NORTH CAROLINA,
RALEIGH, *July 26th*, 1867.

144 The board of internal improvements in consequence of certificate to them under an act of the General Assembly, entitled: 'An act to authorize the president and directors of the Western North Carolina Railroad Company to put said road under contract,' ratified 27th of February 1867, having notified me to subscribe for eight hundred thousand dollars of the capital stock of said company. In order to pay said subscription, sealed proposals will be received by the undersigned on or before the 10th day of August 1867, for the purchase of eight hundred thousand dollars in bonds of the State of North Carolina with coupons for interest at 6 % payable semi-annually on the first days of January and July in each year at the National Bank of the Republic in the city of New York, and the principal payable at the end of thirty years from the first of July 1867. Said bonds to be of the denomination of one thousand dollars each.

As collateral security for the payment of each bond, ten shares of stock in the North Carolina Railroad Company are mortgaged in accordance with "An act to enhance the value of the bonds to be issued for the completion of the Western North Carolina railroad

and for other purposes." Ratified the 19th day of December 1866. The aforesaid bonds are exempt from taxation. No bid for less than par will be entertained.

KEMP P. BATTLE,
Public Treasurer.

July 26th."

Q. Examine the issue of the Raleigh Sentinel February 26th, 1868 and see if you do not find an advertisement of the same import in that issue, and signed by Mr. Kemp P. Battle, public treasurer.

145 A.—.

"STATE OF NORTH CAROLINA:

TREASURY DEPARTMENT,
RALEIGH, N. C., *Feb.* 15, 1868.

The board of internal improvements in consequence of a certificate to them under an act of the General Assembly, entitled: 'An act to authorize the president and directors of the Western North Carolina Railroad Company to put said road under contract,' ratified 27 February, 1867. Having notified me to subscribe for one million three hundred and forty-two thousand four hundred and sixty-six and 66⅔ dollars of the capital stock of said company, in order to pay said subscription sealed proposals will be received by the undersigned on or before the 21st of March 1868, for the purchase of one million three hundred and forty-two thousand bonds of the State of North Carolina, with coupons for interest at 6%, payable semi-annually on the first day of July and January in each year, at the National Bank of the Republic in the city of New York, and the principal payable at the end of thirty years from the first of April 1868. Said bonds to be of the denomination of $1,000 each.

As collateral security for the payment of each bond ten shares of stock in the North Carolina Railroad Company are mortgaged in accordance with an act; 'An act to enhance the value of the bonds to be issued for the completion of the North Carolina railroad, and for other purposes.' Ratified 19th Dec. 1866. The aforesaid bonds are exempt from taxation. No bid for less than par will be entertained.

KEMP P. BATTLE,
Public Treasurer.

Feb. 18th."

146 "STATE OF NORTH CAROLINA:

TREASURY DEPARTMENT,
RALEIGH, N. C. *Feb. 26th*, 1868.

The board of internal improvements in consequence of a certificate to them under an act of the General Assembly, entitled: 'An act to authorize the president and directors of the Western North

Carolina Railroad Company to put said road under contract,' ratified 27th, February 1867. Having notified me to subscribe for one million three hundred and forty-two thousand four hundred and sixty-six and 66⅔ dollars of the capital stock of said company in order to pay said subscription sealed proposals will be received by the undersigned on or before the 21st of March 1868, for the purchase of one million three hundred and forty-two thousand bonds of the State of North Carolina with coupons for interest at 6%, payable semi-annually on the first day of July and January in each year at the National Bank of the Republic, in the city of New York, and the principal payable at the end of thirty years from the first of January 1868. Said bonds to be of the denomination of $1,000 each.

As collateral security for the payment of each bond ten shares of stock in the North Carolina Railroad Company are mortgaged in accordance with an act: 'An act to enhance the value of the bonds to be issued for the completion of the Western North Carolina Railroad, and for other purposes.' Ratified 19th Dec. 1866. The aforesaid bonds are exempt from taxation. No bid for less than par will be entertained.

KEMP P. BATTLE,
Public Treasurer.

Feb. 18th."

147 Q. Please examine the issue of the Raleigh Sentinel of Feb. 18th, 1868, and see if you find the advertisement which you have just read, and then examine each successive issue for thirty days thereafter, and see if you find the same advertisement in each issue of this paper?

A. Up to and including the issue of March 6th.

Q. Examine each issue of the Raleigh Sentinel commencing Friday July 26th, including the issue of August 12th, and see if you find the advertisement which is copied at the beginning of your testimony.

A. July 26th, to August 12th, inclusive, 1867.

M. O. SHERRILL.

Subscribed to this — day of November, 1902.

KEMP PLUMMER BATTLE, a witness produced on behalf of the complainant being first duly sworn, deposes and says in answer to the interrogatories propounded to him by Mr. Harris of counsel for complainant, as follows:

Q. Mr. Battle will you please state what years you were public treasurer?

A. From about the 28th of December 1865 until the 1st of July 1868; I went in a few days before the 1st of January.

Q. Will you please examine chapter 228 of the Laws of 1854–'55, and chapter 106 of the Laws of 1866–'67, and state whether you issued the bonds required of you by these two acts?

A. I think I did, sir.

Q. Will you please examine the advertisement in the Raleigh

Sentinel of February 26th, 1868 and August 12th, 1867, and
148 state whether or not they were inserted in these papers by you, in your official capacity as State treasurer?

A. They were sir.

Q. This was done also in compliance with chapter 228 of the Laws of 1854–'55, and chapter 106 of the Laws of 1866–'67, were they not?

(Counsel for the defendant, State of North Carolina objects to this question as being incompetent and irrelevant upon the ground that it is an effort to prove by the witness that he has complied with the law, and the only thing you can prove was what he did, not whether it was in accordance with the law, in his opinion.)

A. I can state I endeavored to comply with the law—I think I did.

(Answer objected to by the counsel for defendant, State of North Carolina.)

Q. Was there any fraud in connection with the issuance of these bonds, Mr. Battle?

(The counsel for the defendant, The State of North Carolina, objects to the question.)

A. None that I knew of.

(1) Q. Did the State of North Carolina subscribe for stock in the Western North Carolina railroad while you were treasurer?

A. Yes sir.

Q. Can you state at what time?

A. No sir I do not remember at what time.

(Counsel for defendant, State of North Carolina, objects to
149 that; being a matter of record.)

Q. Can you state for what amount?

A. No sir I cannot state without looking at the treasurer's reports, but on amount sufficient to cover the bonds embraced in the second advertisement heretofore read

Q. What did you do with these bonds, Mr. Battle?

(2) A. Well the Western North Carolina railroad did bid for them, and I turned them over to them.

Q. Did you exchange these bonds at par for the stock of the Western North Carolina railroad?

A. In that way, sir, by passing receipts.

Q. You mean to say that you subscribed for stock in the Western North Carolina railroad as required by law, for the State of North Carolina and paid for the stock of the railroad company with the bonds mentioned in the two advertisements heretofore set out, the railroad company accepting these bonds at their par value?

(Counsel for the defendant, State of North Carolina, objects to the question, upon the ground that it calls for the opinion of the witness as to whether the subscription and the delivery of the bonds was

made in accordance with law, and assumed that it was so done, which is denied by the counsel.)

A. I think substantially that was the case. I am inclined to think though, that the practice was to consider the bonds as having been paid for, and receipting to the company for the money, but that would be mere matter of form.

Q. I understand you to mean that the stock of the company was paid for by the bonds of the State?

150 A. Yes sir that was substantially so.

It is agreed by counsel for all parties that the following acts of the General Assembly of North Carolina are in evidence:—First, chapter 228 of the Laws of 1854–'55, entitled "An act to incorporate the Western North Carolina Railroad Company," ratified 15th day of Feb. 1855. Chapter 106 of the Public Laws of 1866–'67 entitled "An act to enhance the value of the bonds to be issued for the completion of the Western North Carolina railroad, and for other purposes," ratified 19th day of Dec. 1866. Chapter 138 of the Public Laws of 1879, entitled "An act to adjust and renew a portion of the State debt," ratified 14th day of March, 1879. Chapter 98, Laws of 1879, entitled "An act to compromise, com-ute and settle the State debt," ratified the 4th day of March 1879. Chapter 82, Acts of 1848–'9, being "An act to charter the North Carolina Railroad Company," ratified —— — ——. Chapter 32 of the Laws of '54–'55, ratified —— — ——.

The acts above mentioned are referred to in the pleadings, and are attached as exhibits to these depositions, (A–F). It is further stipulated by the counsel representing all parties that counsel on either side may put in evidence and use in the trial of the cause, also evidence chapter 98 of the Laws of 1866–'67, entitled "An act to authorize the president and directors of the Western North Carolina Railroad Company to put said road under contract," and ratified 27th of Feb. 1867, any act of the General Assembly of North Carolina, public or private, as they appear in the printed volumes, which are to be printed as part of the evidence in the cause and annexed as an exhibit.

151 Cross-examination by counsel for the State of North Carolina:

Q. Don't you remember Mr. Battle that the State subscribed for two-thirds of the stock of the Western North Carolina railroad?

A. That is my memory, yes sir.

Q. By the 8th section of the original charter of the Western North Carolina Railroad Company, it was provided that whenever it should appear to the board of internal improvements of this State, by certificate signed and sealed by said agent, commissioners or a majority of them, the sum of $300,000 has been subscribed for, and taken and the 5% paid in thereon, said board of internal improvements shall be, and they are hereby authorized and required to direct the treasurer of the State to subscribe, on behalf of the State, to the stock in said Co. to the amount of $600,000 in the capital stock

of said Co." Did you have, in your office as treasurer, such certificates as are described in this section?

A. I do not remember of it.

Q. If such certificates had been made, would they not have been a part of the records of your office?

(Counsel for defendant, Charles Salter, and counsel for complainant object to this question, as being immaterial.)

A. I should think so as a matter of opinion.

Q. Did you do any official acts as treasurer that were not made a matter of record?

(Same objection by counsel for defendant Charles Salter, and counsel for complainant.)

A. That's a pretty hard question. Not unless it was accidentally. Some time my clerk might have forgotten.

152 Q. Do you have any recollection of ever having subscribed for stock in the Western North Carolina Railroad Co. on behalf of the State any sum whatever at any time?

(Objection by counsel for defendant, Charles Salter, and counsel for complainant on the ground that the subscriptions by the State were made by public law, and the law speaks for itself.)

A. I have no positive remembrance. It has been 35 years ago.

Q. Have you, at any time, since you ceased to be treasurer of the State, examined the records of that office with a view to seeing whether there were any records of your action in issuing the bonds to which your attention has been called in your examination-in-chief?

(Objected to by counsel for defendant, Charles Salter, and counsel for complainant, as being immaterial.)

A. I have not.

Q. Have you been requested to make any such examination by the complainant in this case, or by any one of the defendants?

(Same objection for defendant, Charles Salter, and counsel for complainant.)

Q. No sir.

Q. Did the Western North Carolina Railroad Co., while you were treasurer, to your knowledge, issue any stock to the State of North Carolina whatever, and certificates of stock?

A. I have no recollection of it.

153 Q. State whether or not the Western North Carolina Railroad Co. made any sealed bid for the bonds about which you were examined in chief, at any time?

A. I have no recollection on the subject.

Q. If said Co. did make any sealed bid, what would have been done with that bid by you as treasurer?

A. It would have been accepted.

Q. Would it have been filed as a part of the records in your office?

A. Yes sir.

Q. Have you ever searched the office to see if any such bid was there?

A. No sir.

Q. Can you recollect anything in relation to the terms of any bid file- of the Western North Carolina Railroad Co. for said bonds?

A. I remember the president giving me a receipt for them.

Q. Do you remember who the president was?

A. Col. Tate.

Q. I ask you if you do not remember that Mr. Simonton was president and Mr. Tate was secretary?

A. I do not know sir, Tate acted. He came to my office and made the transaction.

Q. I understand you to say then, Dr. Battle, that you have no recollection of what transpired between you as treasurer and the Western North Carolina Railrod Co., except that Mr. Tate receipted you for bonds?

A. Yes sir.

Q. Look upon this book and see whether or not you recognize it, and what book it is?

154 A. It is the book of bond receipts belonging to the treasury department.

Q. State whether you find the receipt of Tate to which you referred in your evidence in the last question?

A. Yes sir.

Q. Please read it.

A. Simonton was treasurer.

Q. Just read the receipt, Doctor. Do you recognize that as the receipt that Tate gave you?

A. Yes sir.

$750,000. TREASURY DEPARTMENT, N. C.,
RALEIGH, *Sept. 3rd*, 1867.

Rec'd of Kemp P. Battle, public treasurer, seven hundred and fifty ($750) State coupon bonds of $1,000 each, dated July 1st, 1857, and running thirty (30) years. "Issued by authority of an act of the legislature of North Carolina to incorporate the Western North Carolina Railroad Company," ratified the 15th day of February 1885, chapter 228 as amended by an act ratified the 27th day of February 1867, chapter 98 entitled "An act to authorize the president and directors of the Western North Carolina Railroad to put said road under contract" and further by an act ratified the 19th day of December, 1866 chapter 106 entitled "An act to enhance the value of the bonds to be issued for the completion of the Western North Carolina Railroad, and for other purposes," said bonds numbering 3772 to 4521 both inclusive.

SAM'L McD. TATE,
Pres't W. N. C. R. R. Co.,
For R. F. SIMONTON, *Treas.*

Q. Do you know the handwriting of Sam'l McD. Tate?
155 A. Yes, sir.
Q. State whether or not that receipt is signed by him?
(3) A. That is. Tate was president. Simonton was treasurer, as I said. The next was R. F. Simonton, treasurer, for Sam'l McD. Tate, president. The last one is by Simonton only, and I do not know his signature. I cannot say now.
Q. Is this the receipt that was given?
A. Yes sir that is

Introduced without objection.

$600,000.

TREASURY DEPARTMENT,
RALEIGH, *April 2nd*, 1868.

Rec'd of Kemp P. Battle, public treasurer, six hundred (600) State coupon bonds of $1,000 each, dated January 1st, 1868, and running thirty (30) years, "Issued under act of assembly, to incorporate the Western North Carolina Railroad Co." ratified 11th February, 1855, as amended by act ratified Feb. 27th 1867, chapter 89, and act ratified December 19th, 1866, chapter 106, said bonds numbering 4572 to 5171 both inclusive.

R. F. SIMONTON, *Treasurer*,
For SAM'L McD. TATE,
Pres't W. N. C. R. R. Co.

$773,000.

TREASURY DEPARTMENT,
RALEIGH, N. C., *April 16th*, 1868.

Rec'd of Kemp P. Battle, public treasurer, fifty State coupon bonds of $1,000 each dated July 1st 1857, and due July 1st, 1897,
156 from No. 4522 to 4571 both inclusive also 723 State coupon bonds of $1,000 each dated January 1st, 1868, due January 1st, 1898, Nos. 5172 to 5894 both inclusive "Issued under act of General Assembly to incorporate the Western North Carolina Railroad Co.," ratified Feb. 15th 1855, as amended by act ratified Feb. 27th, 1867, chapter 98 and act ratified December 19th–1866 chapter 106—entitled An act to enhance the value of the bonds to be issued for the completion of the Western North Carolina railroad and for other purposes.

R. F. SIMONTON,
Treasurer W. N. C. R. R. Co.

The next one is a receipt by H. C. Cowles, treasurer Western N. C. Railroad Co., dated May 20th, 1869, for $340,000, which reads as follows:—

Western N. C. R. R. Co.

$340,000.

TREASURY DEPARTMENT,
RALEIGH, N. C., *May 20th*, 1869.

Rec'd of D. A. Jenkins, public treasurer, three hundred and forty State coupon bonds of $1,000 each, dated Oct. 1st, 1868 and running

thirty years issued by authority of "An act of the General Assembly of N. C.," ratified Feb. 15th, 1855—chapter 228, as amended by acts of 1856 and '67 chapters 98 and 106.

Said bonds being numbered from 5914 to 6253 both inclusive.

HENRY C. COWLES,
Tr. W. N. C. R. R'd Co.

These are admitted without objection.

157 The counsel for the State introduces the petition presented to the legislature of North Carolina about the first day of March, at its session of 1901. Said petition being in behalf and signed by S. M. Shaffer and S. Shaffer, by F. H. Busbee, attorney. A printed copy of this petition marked Exhibit G is herewith filed, and is agreed by counsel that the same shall be considered as original.

Q. Mr. Battle, in this exhibit you will find an endorsement by you on one of these bonds, which endorsement is similar to that on the others in evidence?

A. Yes sir.

Q. You will notice that you undertook to mortgage or pledge ten shares of the stock in the Western North Carolina railroad, originally subscribed by the State. Were not all of these shares delivered and pledged by you?

A. No sir.

Q. When you delivered these bonds?

A. No sir.

Q. And when you made that endorsement?

A. That is all that was done sir.

Q. Did the State of North Carolina have any certificates of stock at that time in the North Carolina Railroad Co.?

A. I do not know sir.

Q. Don't you know as a fact that they never have issued any?

A. No sir I do not know anything about it. I saw something in the paper about it.

Q. So then there were no certificates to your knowledge in existence at the time you made this endorsement on these bonds,

158 and at the time of their delivery to the railroad Co.?

A. No sir.

Q. We understand you to say that you have no recollection of making any subscription to the Western North Carolina Railroad Co.?

A. No sir I do not remember.

Q. And that all you did was simply to take these receipts and deliver the bonds?

A. I cannot say that.

Q. Have you no recollection of doing anything else?

A. I have no recollection, but I cannot say it was not done.

Q. But you have no recollection of doing it?

A. No sir.

Q. Nothing more than taking these receipts and delivering these bonds?

A. No I have not.

Q. Except signing the endorsement on the back of the bonds as set out in the bill of complaint, and in the petition (Exhibit —)?

A. I want to state one thing, you asked me did I remember anything about the North Carolina Railroad stock that has been issued. I was one of the counsel in the Swazey case, and I think that it was stated that there were no certificates in the possession of the State.

Q. What time was that Swazey case?

A. About in 1873 or 1874.

159 Cross-examination by counsel for defendant Charles Salter:

Q. Dr. Battle it is alleged in the answer of the State of North Carolina that you did not make any advertisement in the newspapers for the sale of these bonds. Is that so or not?

A. It has been proved that it was not.

Q. Chapter 37 of the act of 1855 required the public treasurer to advertise in one or more newspapers as he may think best, and invite sealed proposals for the purchase of these bonds. Did you obey that law?

A. I have no positive remembrance about it, except I think I obeyed the law, of course. I cannot remember.

Q. You have seen the advertisement which was in evidence?

A. Yes sir.

Q. Now having seen that, I ask you did you advertise according to the requirements of section 37 of the act of 1855?

A. I think I did.

Q. This same act, chapter 37, required you to accept those terms which might be most advantageous to the State. Did you do that?

A. Yes sir.

Q. The same section provided that you should not sell the bonds for less than their par value?

A. I sold them to the company for par, and that was the custom of the office.

Q. I understood you to say that the form of the transac-
160 tion was that the company paid you as treasurer the par of the bonds in cash, and that you paid the company the par of the stock subscription owned by the State to the company in cash?

A. That was the form of it but no money passed.

Q. But the net result to all the parties, that is: to the State and to the railroad company was precisely the same as if the cash had passed, was it not?

(Counsel for the defendant, State of North Carolina, object to the question. First, because it is argumentative and leading, and calls for an opinion rather than for facts, and this objection is made by them as to all of the foregoing testimony, upon the cross-examination by counsel for defendant, Charles Salter.)

Last question withdrawn after objection.

Q. You have already said that you sold the bonds to the railroad Co. at par?

A. Yes sir.

Q. I understood you to say that you paid the company for the stock subscription due by the State to the company, and that you paid it at par in those bonds?

A. Yes sir, and received stock for the same amount.

Q. Dr. Battle, in this transaction, did you act under the advice of counsel?

(Counsel for the defendant, State of North Carolina, objects to the question, upon the ground that it is immaterial and irrelevant. It makes no difference what advice he has.)

The examining counsel states that he asked the question
161 for the purpose of showing the good faith of the State, and of Dr. Battle, its public treasurer in this transaction.

A. I do not remember Governor, whether I consulted Col. Rogers, the attorney general, about that specifically, but I constantly communicated with him about my office, but I cannot say whether in this particular case. I think it is very likely.

Q. Was there a receiver appointed by the United States circuit court in the Swazey suit to take and hold the stock owned by North Carolina in the Western North Carolina Railroad Co.?

A. As to the stock, I know that Solicitor General Phillips received the dividends, and paid them over to the bondholders, I do not know whether they received the stock or not.

Q. These dividends were paid to the State as dividends on its stock, were they not?

A. They ought to have been paid, but they were intercepted by the court.

Q. Then they were paid to the receiver?

A. Yes, sir, the court would not allow it to go to the treasurer.

Q. You do not know whether the received got the certificate of stock or not?

A. No sir, I never heard anything about that.

Q. You remember the State owned $3,000,000 of stock?

A. Yes sir.

(4) Q. How much stock did the State hold in the Western North Carolina Railroad Co.?

162 A. $2,000,000 at first by the act of 1848, and $1,000,000 by the act of 1854, making $3,000,000.

Recross-examination by counsel for the defendant State of North Carolina:

Q. By what authority, if any, did you exchange the bonds of the State for stock in the Western North Carolina Railroad Co.?

A. Well, as I said, ever since the bonds fell under par, the idea was that the company had a right to buy at par, and receipt to the State for the amount and get the bonds, and the State received that much stock for them.

Q. You knew that the act of the General Assembly chartering the Western North Carolina Railroad Co. expressly required that the bonds should be sold for money, and not at less than par?

A. Yes sir.

Q. In disposing of these bonds to the president or treasurer of the railroad company, you did not sell them for cash, but simply turned them over to the company in lieu of paying money. Is that right?

A. Yes sir.

Q. Now did you not take that course, because at that time you had knowledge that the bonds could not be sold at par?

A. Certainly.

Q. Did any one ever offer, or put in a sealed bid, or a bid of any kind, to take the bonds at par?

A. No sir, the company made the only offer.

163 Q. I ask you if you do not remember that the offer made by the company was simply a verbal offer, made by its treasurer, and that no sealed bid was put in by the company at all?

A. I do not remember anything about that.

Q. I ask if you have any recollection of ever having entered as subscription on behalf of the State, upon the books of the Western North Carolina Railroad Co.?

A. No sir. I do not remember anything about it.

Q. And if there was ever a subscription entered on those books, or any certificate of stock issued to the State, you know nothing of it?

A. No sir.

Q. Now I will ask you Doctor, if, when you were first questioned in regard to your having advertised for sealed bids, you did not say to the counsel for the State of North Carolina, in this case that you had no recollection of making such advertisement?

A. I did not have, until I saw it here this morning.

Q. Do you not remember that counsel for the State of North Carolina did enquire of you in regard to this matter before preparing the answer to the bill of complaint.

A. Yes sir.

Q. With a view to making a correct statement in the answer?

A. No sir.

(Question objected to by counsel for defendant, Charles Salter, unless it is propounded for the purpose of impeaching the witness.)

A. Yes, sir.

164 Recross-examination by counsel for defendant Charles Salter:

Q. Suppose the railroad Co., had paid you the par of the bonds in cash, and you had paid in cash the par of the stock to the railroad Co., please state wherein would have been the difference between that transaction, and the transaction which you actually made?

A. Well, the difference was very apparent, Governor, the company would get the bonds and sell them for less than par and would not get the benefit of the difference between the amount they got and par. The State got the stock at par.

Q. You say the State got the stock at par, by this you mean, do you, that the State paid par for the stock?

A. The State paid $1,000 bonds, and got $1,000 stock.

Q. Do you want to adhere to that answer you made just now, after hearing that question?

A. I thought you wanted to know the whole result of the thing. The legal position of the parties was that the State would have the stock for $1,000, and the company would have the bonds for $1,000.

Q. So the company paid $1,000 for one thousand of bonds, and the State paid $1,000 for $1,000 of stock?

A. The company paid $1,000 stock for $1,000 bonds.

KEMP P. BATTLE.

Subscribed to this — day of November, 1902.

Explanation.

I sign this paper with the following explanation:

165 1. In question marked (1) the word "bonds" should be "stock."

2. In answer marked (2) "did part for me" is unmeaning—evidently should be "did bid for them."

3. In answer marked (3) it should be Tate was president and Simonton treasurer as already stated.

4. In question marked (4) I understood that the North Carolina Railroad Company was meant and answered accordingly. I do not know what stock the State had in the W. N. C. R. R. Co.

K. P. BATTLE.

Corrections made by witness allowed to go in by consent of counsel present.

ED. S. BATTLE, *Com'r.*

Adjourned until 3.30 this day at same place.

Taking of testimony resumed according to adjournment.

Further hearing of the court adjourned until Nov. 7th, same place, 10 o'clock a. m.

Testimony resumed in pursuance of adjournment.

CHARLES B. AYCOCK, witness produced in behalf of defendant, State of North Carolina, being first duly sworn, deposes and says, in answer to the interrogatories propounded to him by counsel for the defendant, State of North Carolina, as follows:

Q. Do you occupy any official position in the State of North Carolina, and if so what and when did your term commence?

166 A. Yes. I am governor of the State, and was inaugurated on the 15th of January, 1901.

Q. Did the authorities of the State of South Dakota make any demand upon you for the payment of these bonds before bringing suit thereon?

A. No.

Q. Did you have any negotiations with them or with any person on their behalf with reference to these bonds before this suit was brought?

A. No.

Q. When did you first learn that the State of South Dakota was in possession of any bonds issued by the State of North Carolina, claiming to be the owner thereof?

A. My recollection is that my first knowledge came from the newspaper account of the application of South Dakota to the supreme court for leave to file this bill.

CHARLES B. AYCOCK.

Subscribed this — day of November, 1902.

——.

Dr. J. J. MOTT, witness produced on behalf of the defendant, State of North Carolina, being first duly sworn, deposes and says, in answer to the interrogatories propounded to him by counsel for defendant, State of North Carolina, as follows:

Q. Dr. where do you live?

A. Statesville, N. C.

167 Q. What is your profession, or vocation.

A. I am a farmer.

Q. State whether or not at any time in your life you sustained any relation to the North Carolina Railroad Co., if so what relation and when?

A. I was director of the Co., appointed by the State, and president in 1868 to 1872—about four years.

Q. During the time you were president of the Co., state whether you had any and if so, what knowledge of the bonds of the State of North Carolina issued by the State under the act of Dec. 19th, 1866?

A. I received $340,000 in bonds—three hundred and forty $1,000 bonds of that issue. The treasurer of the Co. received them from the treasurer of North Carolina.

Q. State whether or not you, acting as president of your Co., or any one acting for the Co. to your knowledge, paid the State anything whatever for those bonds?

A. No I paid the State nothing.

Q. Now state whether or not you disposed of the bonds which had been delivered to you by the treasurer of the State, and if you did, state at what price?

(Objection by counsel for complainant and defendant, Charles Salter, because question is irrelevant to any issue in this case.)

A. I sold bonds at different times to different people. Sold 340 bonds at prices ranging from 24c. to 45c.

Q. State whether that was the best price you could get for them?

(Objection by counsel for complainant and defendant,
168 Charles Salter, because question is irrelevant to any issue in this case.)

A. At the time it was the market price.
Q. Who was the treasurer of the Co. whilst you were president?
A. H. C. Cowles and Robert F. Simonton.

Cross-examination by counsel for defendant Charles Salter:

Q. Do you not know that North Carolina subscribed to the stock of the Western North Carolina Railroad Co.?
A. Well so far as I can understand the matter, why it did.
Q. Do you not know that the State held some two-thirds of the stock in the Co.?
A. It held the majority of the stock.
Q. Did you not as president of the railroad Co. in the matter of these bonds and in the matter of your receiving these bonds from the State, act in compliance of the law as set out in the charters of the Western North Carolina Railroad Co., and the amendment thereto?

(Counsel for the defendant, State of North Carolina, objects to that on the ground that the witness is asked to express an opinion instead of stating facts.)

A. I supposed I was acting in accordance with the law in receiving the bonds.
Q. Is it not your best belief that you did whatever the charters of your Co. and the law required you to do?

(Same objection by counsel for defendant, State of North Carolina.)

169 A. I answer yes.
Q. Doctor did you not borrow money on these bonds, putting them up as collateral?
A. Yes.
Q. So because you could not pay the debt, were they sold by the pledgees?
A. No not necessarily. I want to explain: The bonds were in my hands, I would not put up all of them as collateral, and of course they were there subject to my order to sell, they were not sold by the pledgee in the ordinary way of closing out that contract, they were sold on my order altogether. There was one transaction where they were borrowed outside and used as collateral, but I sold other bonds and paid that debt and relieved the collateral.
Q. You offered these bonds on the open market for sale, did you not?
A. Yes through brokers.
Q. You regarded them as good and honest bonds, did you not?
A. I did at the time. I regarded these as good and honest bonds. I did not know about the special-tax bonds. Upon further reflection I think the State bonds were never hypothecated, but were placed with brokers with an order to sell. I think the bonds that were hypothecated were the first-mortgage bonds of the railroad Co., and not the State bonds.

Cross-examination by counsel for complainant:

170 Q. These bonds which are the subject of this suit, that you received from the State, was in consequence of a subscription made by the State to the stock in the Western North Carolina Railroad Co., was it?

(Objection by counsel for defendant, State of North Carolina, for the facts speak for themselves.)

A. The State made a subscription for stock in the Western North Carolina Railroad Co., and issued bonds to pay for the stock, that was an appropriation as I understand it, to the Western North Carolina railroad. The State made an appropriation of bonds to the Western North Carolina railroad, and of course it owned stock in the railroad to that extent.

Q. Doctor, the bonds you received, were they not received by you in payment of this stock heretofore subscribed by the State for stock in the Western North Carolina Railroad Co.?

(Objection — counsel for the defendant, State of North Carolina, because the receipts and statistics speak for themselves.)

A. I received the bonds as a subscription or appropriation rather to the Western North Carolina railroad.

Q. Do you not know that the State subscribed for stock in the Western North Carolina railroad as required by act of the General Assembly, and that when these bonds were delivered to you by the State treasurer, was it not in payment of the stock for which the State had subscribed by reason of the act of the General Assembly?

A. The State as I said appropriated bonds for the Western
171 North Carolina railroad, and I suppose this stock was intended to be payment for the bonds. The truth of the matter is, you know, in receiving the bonds they were received by other officers of the Co. than myself, that is: these bonds, and that nothing was said about stock in the matter. I took the bonds and sold them as an appropriation to the Western North Carolina railroad, as an officer of the Co., who is entitled to do that thing.

Q. Did you receive them as a donation by the State of North Carolina, or in payment of the stock to which the State had subscribed?

A. I suppose now they were given to the railroad in lieu of the stock.

Redirect examination by counsel for the defendant State of North Carolina:

Q. Can you say of your own knowledge or from any inspection you have made of the books of the Co. or any of them, that the State of North Carolina through any of its officers ever entered upon the books of the Co. a subscription for any stock whatever in that Co.?

(Objection by counsel for complainant, that the records and facts speak for themselves.)

A. I do not know of my own knowledge of it being done, I only know that the Co. or the State was represented in the Co., and voted a certain amount of stock.

Q. Did the Co. whilst you were its president ever receive from the State of North Carolina, through its treasurer or other officer, any money, the proceeds of the sales of State bonds issued under the act of Dec. 19th, 1866?

172 A. I received nothing but the bonds.

Q. Before receiving these bonds did you make any sealed bid for them, and file it with the treasurer of the State, or with the board of internal improvements of the State, or with any other officer of the State?

A. No not that I remember.

Re-recross-examination by counsel for defendant Charles Salter:

Q. You say that the Co. got nothing from the State for the stock but the bonds?

A. Nothing but the bonds. All I got from the State was the bonds.

Q. But you sold the bonds did you?

A. I sold the bonds.

Q. And you got the proceeds of the sale didn't you?

A. Yes.

Q. And the Co. got the money didn't it?

A. Yes, and I applied it to the debts of the company.

Q. Do you not remember that the governor of the State of North Carolina, for the State, appointed three-fourths of the directors in your company?

A. The majority of them, I forget the proportion.

Q. It was either three-fourths or two-thirds, was it not?

A. Somewhere along there.

Q. You were elected president by directors who were appointed by the State, were you not?

A. Yes.

173 Q. The State was entitled to these directors by reason of its being a large stockholder, having much more than a majority, was it not?

A. Yes.

Re-redirect examination by counsel for defendant State of North Carolina:

Q. Doctor, so far as the directors on the part of the State were concerned, do you know anything except what was authorized and required by the charter of the company?

A. No.

J. J. MOTT.

Subscribed to this — day of November, 1902.

—— ——.

H. C. Cowles, witness produced on behalf of the defendant, State of North Carolina, being first duly sworn, deposes and says, in answer to the interrogatories propounded to him by counsel for defendant, State of North Carolina, as follows:

Q. Mr. Cowles, what is your occupation?

A. I am clerk in the circuit and district courts of the western district of North Carolina.

Q. What connection did you sustain in the Western North Carolina railroad?

A. I was agent a while, conductor a while, and then sec'y and treasurer.

Q. Covering what period were you secretary and treasurer?

174 A. From April 1869, to May 1871, according to my recollection.

Q. As such did you have the custody of the records, books of the said railroad Co.?

A. Yes sir.

Q. Please state what book it is that you have in your hand.

A. These are the printed reports of the officers and accounts of the Co., so far as they are related to the transactions, as receipts and disbursements of the funds of the Co., and reports of the officers.

Q. I wish you would turn, if you can, to parts that are contained in the report of Sam'l McD. Tate as president, with reference to the sale of said bonds.

(Objected to by counsel for defendant, Charles Salter, as being immaterial.)

A. Col. Sam'l McD. Tate was president prior to Dr. Mott for about a year, and Dr. Mott served about four years as president, and Col. Tate was financial agent of the Co. Dr. Mott was elected president Aug. 28th, 1868. Col. Tate's accounts show that he received 1973 bonds of $1,000 each. Here is his report to the Co., commencing Sept. 19th, 1868, showing the sales of these bonds and the prices obtained from them.

Q. Just state the prices obtained from the bonds.

(Objection by counsel for the defendant, Charles Salter, and the complainant as being immaterial, irrelevant and impertinent.)

A. They run from 53 and 67⅝, in this report. There is
175 a subsequent report to this.

Q. When was that report made?

A. To August 26th, 1869, which reads as follows:

Sept.	19, 1868.	Int. ref'd N. Y. W. Co.			$175.00
Oct.	7, "	30 bonds sold		67	20,100.00
	19, "	108	"	67½	72,900.00
	" "	2	"	67⅝	1,352.50
	" "	5	"	67⅝	3,368.75
	" "	50	"	67½	33,750.00
	" "	4	"	67¼	2,690.00

Oct.	22,	1868.	1 bond	sold 67⅝	676.25
	"	"	5	" 67½	3,375.00
	24,	"	5	" 67½	3,362.50
	"	"	2	" 67⅝	1,347.50
	28,	"	10	" 66½	6,650.00
	29,	"	30	" 66¼	19,875.00
	"	"	21	" 66	13,860.00
Nov.	3,	"	2	" 67½	1,350.00
	"	"	10	" 65¼	6,525.00
	"	"	10	" 65	6,500.00
	16,	"	69	" 65	44,850.00
	"	"	20	" 64⅞	12,950.00
	17,	'69.	By loan discounted		49,375.00
	"	—.	"		49,308.56
	28,	—.	40 bonds sold Bk. Republic		25,684.92
	"	—.	30 bonds 64½		19,350.00
	"	—.	10 bonds 64¼		6,425.00
	"	—.	40 bonds 64		25,600.00
	"	—.	10 bonds 63¼		6,325.00
176	Dec. 4,	—.	3 bonds 64		1,920.00
	"	—.	10 bonds 63¾		6,375.00
	10,	—.	30 bonds 63		18,900.00
	"	—.	5 bonds 62⅝		3,137.50
	11,	—.	6 bonds 62		3,720.00
	14,	—.	15 bonds 62½		9,075.00
	"	—.	20 bonds 60		12,000.00
	"	—.	70 bonds 58		40,600.00
	15,	—.	35 bonds 60		21,000.00
	"	—.	10 bonds 60¼		6,025.00
	"	—.	Interest rec'd S. & Co		457.48
	"	—.	30 bonds 60¼		18,075.00
	"	—.	120 bonds 60		72,000.00
Dec.	16,	—.	Loan Shoe & Leather bank		49,375.01
	"	—.	25 bonds 62		15,500.00
	"	—.	5 bonds 61..		3,093.75
	"	—.	Interest rec'd Raleigh N. B		49.66
Jan.	18,	'69.	" "		632.80
	"	—.	" Patton & Co		18.75
	30,	—.	16 bonds 61½		9,840.00
	"	—.	30 N. C. R. R. bonds		24,400.00
Feb.	18,	—.	75 bonds 59		44,250.00
Mar.	8,	—.	Col. loan Ral. nat. bank		13,106.70
	"	—.	Int. A. & N. C. R. R. bonds		3,000.00
	8,	'69.	Interest T. W. D. & Co		320.19
	"	—.	Interest S. & Co		580.65
Apr.	1,	'69.	By 20 bonds 69½		11,900.00
	"	—.	10 bonds 59⅝		5,962.50
	23,	—.	113 bonds sold by Bk. Rep		60,182.50
May	1,	—.	34 N. C. R. R. bonds		28,900.00
	"	—.	Interest on same		1,360.00
177	"	—.	5 N. C. R. R. bonds		4,250.00

Jul-	1,	—.	Int. on A. & N. C. R. R. bonds.....	3,000.00
	"	—.	50 bonds 53¼.....	26,625.00
	"	—.	30 bonds 53¼.....	15,975.00
	"	—.	5 bonds 53½.....	2,675.00
	"	—.	10 bonds 53.....	5,300.00
	6,	—.	Int. col. of S. & Co.....	42.54
August	—,	—.	2 bonds 60.....	1,200.00

There is another report commencing with the balance on hand August 26th, 1869, and reads as follows:

Aug.	26,	1869.	To bal. on hand at last report				$50,083.16
Spt.	23,	—.	" sale 30 N. C. bonds			@ 45.....	13,500.00
Oct.	4,	—.	" " 18	"		@ 45.....	8,100.00
			" " 15	"		@ 44½.....	6,675.00
			" " 18	"		@ 43.....	7,740.00
			" " 5	"		@ 43½.....	2,175.00
			" " 10	"		@ 41¾.....	4,175.00
			" " 10	"		@ 41.....	4,100.00
			" " 2	"		@ 40½.....	810.00
Oct.	6,	—.	" " 78	"		@ 40.....	31,200.00
			" " 5	"		@ 42½.....	2,125.00
Nov.	16,	—.	" " 16	"		....	15,148.48
"	20,	—.	" " 13	"		.....	4,805.76
"	25,	—.	" " 14	"		.....	5,021.99
Jan.	31,	1870.	" " 25	"		@ 25.....	6,250.00
Feb.	1,	—.	" " 10	"		@ 25.....	2,500.00
	"	—.	" " 4	"		@ 24¾.....	990.00
178	"	—.	" " 5	"		@ 24⅝.....	1,231.25
	"	—.	" " 81	"		@ 24½.....	19,845.00
	"	—.	" " 30	"		@ 24⅛.....	7,237.50
	"	—.	" " 45	"		@ 24.....	10,800.00
April	23,	—.	" " 300	"		by Bk. Republic.....	70,000.00

Dr. Mott and I received 681,000 bonds in 1869, of which 340,000 were bonds similar to those in suit, issued under and act of December 19th, 1866, and they — disposed of in the manner, at the time and at the place contained in the following report, which reads as follows:

1869 & 1870.

July	12.	To sales thro' H. Clews & Co., 10,000 bs. @ 45c.....		$4,037.05
	"	To sales thro' H. Clews & Co., 5,000 @ 45½.....		2,043.52
	"	" thro' H. Clews & Co., 20,000 @ 45.....		8,074.10
	"	" thro' H. Clews & Co. 5,000 @ 45.....		2,018.52
	"	" thro' H. Clews & Co. 10,000 @ 45½.....		4,087.04

	"	"	thro' H. Clews & Co. 10,000 @ 45¼	4,062.04
179	"	"	thro' H. Clews & Co. 10,000 @ 45	4,037.05
March	8.	"	thro' H. Clews & Co. 8,000 @ 24	1,549.81
March	8.	To	sales thro' H. Clews & Co., 2,000 @ 24	387.45
	"	"	thro' H. Clews & Co., 10,000 @ 24	1,937.06
	"	"	thro' H. Clews & Co., 100,000 @ 20¾	16,122.92
April	—.	"	cash	91,391.67
June	—.	"	"	99,840.00
Jan'y	18.	"	thro' Soutter & Co., 10,000 @ 24	2,387.86
	"	"	thro' Soutter & Co., 50,000 @ 23¾	11,811.31
	"	"	thro' Soutter & Co., 15,000 @ 24	3,580.89
	"	"	thro' Soutter & Co., 15,000 @ 23½	3,505.89
	"	"	thro' Soutter & Co., 10,000 @ 23¾	2,362.26
March	5.	"	thro' Soutter & Co., 50,000 @ 20¾	10,311.46
July	29.	"	Bayne & Co., 241,000 @ 26	57,866.65
	"	"	Bayne & Co., 29,000 @ 26	7,564.80
September	—.	"	" 3,000 @ 23	547.44
	"	"	Tredegar Co., 68,000 bonds rec'd from S. McD. Tate	68,000.00
				$407,526.79

That report shows that the bonds received by Dr. Mott
180 from Mr. Tate were not sold by him.

Q. Mr. Cowles you have made a careful examination of the records in order to ascertain the prices at which these bonds issued under the act of December 19th, 1866, were sold have you not?

A. I have made a careful examination of the reports of the officers showing the bonds sold.

Q. What was the range of prices obtained by the company according to your recollection and best knowledge of these bonds turned over by the State to the Western North Carolina Railroad Co.?

(Objection by counsel for defendant, Charles Salter, because the question is irrelevant.)

A. From 67⅞ to as low as 23c.

Cross-examination by counsel for complainant:

Q. Did any of these second-mortgage bonds sell as low as 23c.?
A. That I do not know. Those sold at 23c. may have been the special-tax bonds.

It is stipulated by counsel that the annexed explanatory letter of witness be admitted as part of his testimony.

ED. S. BATTLE,
Commissioner.

181 Office United States court, western district of North Carolina, Statesville, N. C.; H. C. Cowles, clerk.

Nov. 14th, 1902.

Mr. Ed. S. Battle, commissioner, Raleigh, N. C.

My Dear Sir: I am in receipt of the transcript of my evidence. It makes me say that "Dr. Mott and I received $681,000 bonds in 1869, of which $340000 were similar to those in suit, issued under act of December 19th, 1866, and they were disposed of in the manner, at the time and prices contained in the following report, which reads as follows:" What I said was, that Mott and I received $613000 of bonds in 1869 &c. The $273,000 and $340,000, as charged in my acc't. The $68,000 was a transaction between Col. Tate and Dr. Mott, as I explained, and I had nothing to do with that, and my acc'ts do not show it. These bonds had been drawn by Tate from the treas'y before I became sec'y & treas., and were charged to him by the former treasurer, Mr. Simonton, and came over to me from him as part of the balance due from Tate.

If the answer showed that $613000 was received by us, instead of $681000, it would be correct; the next question and answer explains, as well as the report, as to the $68,000, and how Mott got them.

182 Can't this change be made.

Governor Russell also asked me, if I was present at the sales or something of that kind, and I answered no, as I was not present, that does not appear.

But, I suppose — is not material.

Yours truly,

H. C. COWLES, *Clerk.*

Daniel L. Russell, witness produced in behalf of the defendant, State of North Carolina, being first duly sworn, deposes and says, in answer to the interrogatories propounded to him by counsel for defendant, State of North Carolina, as follows:

Q. You were governor of the State of North Carolina during the years of 1897, 1898, 1899 and 1900?
A. Yes sir.
Q. You were a practicing attorney?
A. Yes sir.

Q. You are counsel of record in the present case for Charles Salter, one of the defendants, are you not?

A. Yes.

Q. When were you first consulted professionally about this case, Governor?

(Objection on part of counsel for complainant, because it is immaterial, irrelevant and hearsay.)

A. Well, I think it was in March, 1901.

183 Q. Whom by?

(Objection on part of counsel for complainant because it is immaterial, irrelevant and hearsay.)

A. By Mr. Ricaud, who associated me with himself.

Q. Who was he appearing for?

(Same objection on part of counsel for complainant.)

A. The second-mortgage bondholders.

Q. Was he not, and were you not employed by Schaeffer Bros. to assist them in the collection of their bonds held by them of the class sued on in this cause?

(Same objection on part of counsel for complainant.)

A. Mr. Ricaud was employed by them, and Mr. Ricaud afterwards requested me to join with him in representing them, and I did so as his associate.

Q. Were you consulted by Mr. Ricaud about the collection of these bonds prior to March 1901?

(Same objection on part of counsel for complainant.)

A. No, I was not consulted with by him professionally at all.

Q. He informed you some time previous to that, that he had been employed by Schaeffer Bros. to attempt to collect these second-mortgage bonds, did he not?

(Same objection on part of counsel for complainant.)

A. He informed me some time, I think during the year 1900, that he was employed by Schaeffer Bros. and that he intended to bring a suit in the supreme court of North Carolina, under the claims clause in the North Carolina constitution, and afterwards he and Mr. Busbee informed me that they proposed to memorialize the

184 legislature, and my recollection is that they presented to me, as governor, a memorial, and requested me to transmit it to the legislature, and I told them that they might as well send it direct to the legislature.

Q. Do you know about when Mr. Wheeler H. Peckham was employed in this cause?

(Same objection on part of counsel for complainant.)

A. No, I do not know.

Q. Do you have any knowledge whether Mr. Peckham was con-

sulted with reference to bringing this action in the Supreme Court prior to or during the month of March 1901?

(Same objection on part of counsel for complainant.)

A. I do not.

Q. Do you know whether Mr. Peckham was employed at the suggestion of Mr. Ricaud?

(Same objection on part of counsel for complainant.)

A. I will answer this question by saying that I do not remember that it was at Mr. Ricaud's suggestion, and hardly think it was, but it may have been, and I will further say that although I have chosen to answer the question that I do not admit that it is competent, because it involves communications and transactions between the attorneys and the attorn*ies* and clients which are privileged. I will further state since thinking a little further about one of your former questions that my impression is that Mr. Peckham was employed, or consulted with regard to these second-mortgage bonds some time in March 1901.

Q. Did you consult the Schaeffer Bros. or either of them, or
185 any one representing them about the feasibility of bringing a suit on these second-mortgage bonds in the Supreme Court of the United States?

(Same objection on part of counsel for complainant.)

A. While I hardly think I would have consulted with them, as I do not believe they would have known what I was talking about, but if they consulted with me, or if you mean to ask if there were consultations between us, I answer that they were the consultations of attorney and client, and as such they were privileged, and that being privileged I would have no right to divulge them, certainly no such right, unless the privileges were wa-ved by the client. I, therefore, decline to answer the question.

Q. Have you been employed as counsel for the State of South Dakota?

(Same objection on part of counsel for complainant.)

A. No sir.

Q. Are you of counsel at all for the State of South Dakota?

A. No sir.

Q. Are you of counsel for any party in this suit other than Salter?

(Same objection on part of counsel for complainant.)

A. You know very well, Judge Merrimon, that Salter is a representative of a class in this suit, and that class is the second-mortgage bondholders. Salter & Salter represent a class, and I, with my associate represent Salter.

Q. Then you do not appear in this suit for all the second-mortgage bondholders?

(Same objection on part of counsel for complainant.)

186 A. Well, I appear for such of them as are represented. I appear for them so far as Salter can represent them.

Q. And the bonds held by the complainant in this suit are of that character, second-mortgage bonds?

A. Yes, they are second-mortgage bonds.

Q. So that the parties for whom you appear and the complainant in this suit have a common cause against the State of North Carolina?

(Same objection on part of counsel for complainant.)

A. All that is a matter of law, and the question is answered by the general law and the pleadings in this case.

Q. Do you know the fact that Mr. Ricaud appears for the State of South Dakota?

(Same objection on part of counsel for complainant.)

A. I do not.

Q. Have you heard him say he did or did not?

(Same objection on part of counsel for complainant.)

A. Well I am very sure that he does not.

Q. You were not of counsel for any one of course, when you were governor of the State?

(Same objection on part of counsel for complainant.)

A. No sir.

Q. I ask you then if in the conversations which occurred between you and Ricaud and Mr. Busbee while you were governor of the State, with reference to the memorial of the Schaeffers to the General Assembly of the State, it was not stated by one of the other of them that in the event that they were not successful of the memorial, and could not sue in the supreme court of the State,

187 steps would be taken by the Schaeffer Bros. to have a suit brought by some State in the Supreme Court of the United States against the State of North Carolina on these bonds?

(Same objection on part of the counsel for complainant.)

A. I think not.

Q. Did you not hear that question discussed at that time between Mr. Ricaud and Mr. Busbee or any one else?

(Same objection on part of counsel for complainant.)

A. Well, it is possible that there may have been something said about the rights of sovereign to bring suits, just as lawyers would discuss a question, but my recollection is that these gentlemen in all their talk with me were contemplating a suit in the supreme court of North Carolina, and that they afterwards then abandoned that a little while before the legislature met in 1901, and made their memorial.

Q. Do you know who suggested to Simon Schaeffer Bros. the policy

of donating ten of these bonds to the State of South Dakota, or any other State, or any other number of bonds, with a view to acquiring a jurisdiction in the Supreme Court of the United States against the State of North Carolina for the collection of these second-mortgage bonds?

(Same objection on part of counsel for complainant.)

A. I do not know of any suggestions or advice having been given by to Schaeffer or any one other than their counsel, and such advice or suggestions are privileged, and if I knew I would not answer.

Q. If you were not of counsel for Schaeffer Bros. yourself,
188 how could any knowledge which you have of that matter be considered privileged?

(Same objection on part of counsel for complainant.)

A. I have already said I was counsel for the second-mortgage bondholders.

Q. But you said that you were employed in March 1901, and the question is did you know of this scheme prior to that date?

(Same objection on part of counsel for complainant.)

A. I did not know of their doing this or their making the donation or intending to make it until about that time.

Q. Do you mean to say then that you did know it about March 1901?

(Same objection on part of counsel for complainant.)

A. Oh, I knew it when they did it, or about the time that they did it.

Q. Was not this scheme discussed in your presence prior to March 1901?

(Same objection on part of counsel for complainant.)

A. Well if it was, it was between attorneys or between attorneys and clients.

Q. Well, but it could not have been between yourself and your client if you were not employed before March 1901. Then if you had knowledge of it, what knowledge you had is not privileged under the law, and I ask you to state whether you had such knowledge prior to that date?

(Same objection on part of counsel for complainant.)

A. Oh, I don't think I had such knowledge until about that
189 time, either about the time when I accepted the employment from Mr. Ricaud which was about March 1901.

Q. Have you not personal acquaintance with Congressman Burk of South Dakota?

(Same objection on part of counsel for complainant.)

A. Yes.

Q. When did you form his acquaintance?

(Same objection on part of counsel for complainant.)

Q. Whilst you were governor or afterwards?

A. Oh, I think I first met him along about the spring or summer of 1901, possibly the fall.

Q. Then you did not know Mr. Burk before you were employed in this case?

(Same objection on part of counsel for complainant.)

A. I don't think I did.

Q. Is Mr. Burk a law-er?

(Same objection on part of counsel for complainant.)

A. I think he is but I am not sure.

Q. Did you ever talk with Senator Butler at any time with regard to this suit, and if so when?

(Same objection on part of counsel for complainant.)

A. Oh, yes sir, I think I have had talks with him about it. Well in 1901 and 1902.

Q. Did you talk with Senator Butler in regard to a suit against North Carolina to recover these second-mortgage bonds, prior to March 1901?

(Same objection on part of counsel for complainant.)

A. It is possible that I did, or thereabouts, possibly in February, or along about then possibly.

190 Q. I ask you if you did not acquire information from Senator Butler prior to the time you were employed as counsel to this case, that it was in contemplation to so place some of these second-mortgage bonds as to give some State an opportunity to sue the State of North Carolina in the Supreme Court of the United State-, under the constitution authorizing suite by one State against another to recover these bonds?

(Same objection on part of counsel for complainant.)

A. No I do not think he ever gave me that information.

Q. Did you, prior to March 1901 receive information from any source whatever that it was in contemplation by any parties whatever, to so place some of the second-mortgage bonds as to enable one State or some States to sue the State of North Carolina to recover the second-mortgage bonds?

(Same objection on part of counsel for complainant.)

A. Well I cannot undertake to give particular dates, I say generally in and about March 1901—it may have been February—it may have been April. I have already said that I was employed as counsel in this case in and about March 1901. I may have meant by that that I entered into an arrangement with Mr. Ricaud. I had an understanding with him about that time which gave me employment as counsel with him as his associate about that time. Well

that may have been in Feb.—it may have been a month before March 1901. The reason why I say March 1901 is, because I have a distinct recollection of going to New York in or about 1901, and being there, and going there for that purpose, that is why I say
191 March 1901. The employment may have been before that.

Q. Did you have any information from any source whatever, from any parties whatever prior to the time you were employed as counsel for any of the holders of the second-mortgage bonds, that it was in contemplation by any parties or persons whatever to so place a portion of the said mortgage bonds as to enable some State to bring action, or a suit in the Supreme Court of the United States against the State of North Carolina to recover the said second-mortgage bonds?

(Same objection on part of counsel for complainant.)

A. Oh, I might have heard some such talk, the matter was discussed' I remember having some talk with Mr. Busbee about it, well I guess that was in March too, or April 1901.

Q. Do you know at whose suggestion a bill was introduced in the legislature of South Dakota in 1901, to enable that State to accept or receive a gift of any of the second-mortgage bonds, or of any bonds, and what the purpose of that bill was?

(Same objection on part of counsel for complainant.)

A. Oh, I think I heard Col. Stewart of South Dakota, and possibly Mr. Burk say that they had the bill introduced, or that one of them had introduced it, or something of that sort.

Q. I will ask you if you did not at the same time learn that the chief purpose of that act was with a view to receive from the Schaffers a donation of the bonds now in suit, and with a view of bringing a suit against North Carolina to recover?

192 (Same objection on part of counsel for complainant.)

A. Oh, it is not improbable that such an inference was made, it may be that such conclusion was inferential from what they said.

Q. Do you know, Governor, that the bill was going to be introduced in the legislature of South Dakota before it was done?

(Same objection.)

A. I think I did hear it mentioned.

Q. Did you know that Simon Schaeffer was going to donate ten bonds to the State under that bill?

(Same objection.)

A. Did I? No, sir. I did not know that he was going to do it, and indeed I am quite sure, or I have reason to believe at least that he was not willing to do it until about March 1901.

Q. Well did you know why Simon Schaeffer was not willing to do it before that date?

(Same objection.)

A. Well yes, I knew. I know what he said, but I shall not state what he said for reasons already given.

Q. Governor, whilst you were governor, and about the 30th of Oct. 1900, do you remember that there were certain bonds filed with the State treasurer of what are called here second-mortgage bonds, to be exchanged under the act of 1879, by a man named Lichtenauer of New York, and that after these bonds had been cancelled and the new bonds prepared, a despatch was sent either to yourself as governor or to Mr. Worth as State treasurer, recalling these bonds?

193 (Same objection.)

A. Yes I remember the incident, yes sir I think I advised Mr. Denmark to make that record, or Mr. Worth.

Q. Look upon the paper handed you and see whether or not you think that it correctly represents what transpired in relation to that transaction?

(Same objection.)

A. I think it is. My recollection is that Mr. Ricaud, I think it must have been I do not think it could have been Mr. Lichtenauer as I never have seen him, telegraphed me and asked me to see Mr. Worth and get Mr. Worth to hold up the funding of certain bonds as the owner of them would probably want them withdrawn, and I think I showed Mr. Worth the telegram perhaps, or asked him to hold them up until he got orders from the owner, for some time after that I suppose perhaps I might have been out of the governor's office or out of Raleigh, might not have thought of it, or something. Mr. Worth mentioned to me something about it and I asked him to hold it up until he could hear from the party who had telegraphed me, and a few days after that a telegram came to Mr. Worth asking him to return the bonds. I think he brought me the telegram perhaps and said that he had already cancelled the bonds. I told him that it made no difference that the owner of the bonds was entitled to withdraw them if he wanted to at any time before the new 4% were issued, that I thought he had a right in law to do that, and besides the State did not care to grab a man's bonds and try to hold him to a contract that was without consideration against his will and I thought he ought to
194 return the bonds with the certificate on each bond showing why it had been cancelled, and I think I went into Mr. Worth's office with him, and perhaps at his request I dictated that certificate. I think Mr. Denmark took it down in pencil on a piece of paper, and I presume that he afterwards put it on each one of the bonds, and I think I said to Mr. Denmark, or to Mr. Worth, or to both of them, that he had better make a record of that on his bond book, which it seems that he did by this record which you produce now.

(Paper offered to witness, see Exhibit H.)

Q. Can you now recall from whom the second telegram mentioned in your last answer came from?

(Same objection.)

A. My impression is that Mr. Worth had a telegram from the owner himself, Lichtenauer.

Q. Did you at that time know that Mr. Ricaud was associate counsel in this case. *Was counsel for the* second-mortgage bondholders?

(Same objection.)

A. Why, yes, I think I did.

Q. Do you know now that these eight bonds are now held and owned by Schaeffer Bros., and if not by whom are they held?

(Same objection.)

A. I think they are held by John S. Armstrong of Wilmington, N. C.

Q. Do you not know that they went into the hands of Simon Schaeffer, or of Schaeffer Bros., when Lichtenauer parted with them?

(Same objection.)

195 A. I know that from having read the depositions in New York wherein Mr. Schaeffer stated that his brother Simon, I think, bought them from Mr. Lichtenauer.

D. L. RUSSELL.

Subscribed this — day of November, 1902.

Adjourned to Wednesday, December 3rd, 1902, at 10 a. m., at same place.

Taking of testimony resumed according to adjournment at 3 o'clock p. m., Dec. 3rd, 1902, same place.

Present: J. C. L. Harris, Esq., counsel for complainant, Daniel L. Russell, Esq., counsel for defendant, Charles Salter, James H. Merrimon, Esq., George Rountree, Esq., & James E. Shepherd, Esq., counsel for defendant, State of North Carolina.

(Defendant, Simon Rothchilds, not being present either in person or by counsel.)

196 FABIUS H. BUSBEE, a witness produced in behalf of the defendant, State of North Carolina, being first duly sworn, deposes and says, in answer to the interrogatories propounded to him by counsel for defendant, State of North Carolina, as follows:

Q. What is your name, age, residence and occupation?

A. Fabius H. Busbee, age fifty-four, occupation a lawyer, residence Raleigh.

Q. Are you counsel, or of counsel for any of the parties to this suit?

A. I am not. I represented the owners of these second-mortgage bonds before the North Carolina judiciary committee of the General Assembly of 1901, in joint session. I do not appear in the present litigation.

Q. Please explain what you mean by "second-mortgage bonds"?

A. The bonds sometimes called the ten-share bonds for identification, issued in aid of the Western North Carolina railroad, under the acts of 1855 and December 1866, secured by a pledge of ten shares of the stock of the North Carolina railroad. The bonds were authorized to be issued under the act of 1855, and under the act to enhance their value, passed in 1866, ten shares of stock in the North Carolina Railroad Co. were pledged for the security of each bond. The acts of 1855 referred to, are the charter of the Western North Carolina Railroad Company, and the acts amendatory thereto.

Q. Have you read the bill of complaint in this suit?

A. I do not remember whether I have read it; probably
197 cursorily. I do not recall its allegations.

Q. Did you file a petition or a memorial before the committees of the judiciary of the respective houses of the General Assembly of 1901, on behalf of any of the holders of these bonds? If you say you did, please state on whose behalf, and whether the petition set forth the bonds mentioned in the answer to your previous question?

A. I did present such petition, and made an effort to secure an adjustment of the bonds,—that is the bonds alluded to in my answer. The bonds are set out in the petition, and I am informed a copy of the petition has been filed. My employment to represent these bondholders was through A. G. Ricaud, Esq., of New York, formerly of Wilmington, N. C., and all my correspondence was with him.

Q. Did Mr. Ricaud tell you who he represented?

(Objection by counsel for defendant Charles Salter, because the question is irrelevant and immaterial.)

A. He represented a majority of the holders of the bonds. I understood from him that he represented the holders of the majority of the bonds above referred to, being probably counsel for Schaeffer Bros., as the chief representatives of such bondholders.

Q. Did you see, and confer personally with Schaeffer Bros., or with either of the firm of Schaeffer Bros. at any time whilst you were counsel?

(Objection by counsel for defendant, Salter, because question is irrelevant and immaterial.)

A. My impression is—my recollection is that I did not dur-
198 ing the session of the General Assembly. I have known Schaeffer Bros. for many years, but saw them very rarely. If I saw either one, during the time that I was representing them, it was socially, and my recollection is that no legal and business matters were discussed. My instructions and consultations were with Mr. Ricaud.

Q. Well, was Mr. Ricaud in Raleigh at the time the petition was presented to the committees on judiciary of the General Assembly?

(Same objection by counsel for defendant, Salter.)

A. I think not.

Q. Was he in Raleigh at any time during the sitting of that General Assembly?

(Same objection by counsel for defendant, Salter.)

A. I am inclined to think he was, but my recollection is not clear.

Q. Do you remember to have seen him and talked with him at any time during the sitting of the General Assembly, or about that time, either before or after?

(Same objection by counsel for defendant Salter.)

A. I probably did, but I cannot separate at this distance of time conferences in person from those by correspondence.

Q. Do you know how long Mr. Ricaud has been living in New York?

(Same objection by counsel for defendant Salter.)

A. Several years—exactly how long, I cannot remember.

Q. Do you know whether he is in partnership with any lawyers of this State?

199 (Same objection by counsel for defendant, Salter.)

A. I do not think he has any partners in this State. I have talked with him freely about his New York prospects and his business, and he has never made any reference to a North Carolina partnership, although the conversation was such as to bring forth that information, if it be true.

Q. Did he at any time communicate to you either verbally or in writing, a plan or scheme whereby it was intended to donate any portion of the bonds that you have described in your previous answer to some State of this Union, with a view to having this suit brought, to enforce the collection of these bonds?

(Question objected to by counsel for complainant on the grounds of its being immaterial and hearsay.)

A. I hardly think counsel would expect me to answer a question involving communication between counsel and client, because if such conversation had occurred, it would be unprofessional for me to reveal it. As no such conversation did occur, however, I can freely answer he did not.

Q. Did you have any knowledge from any source whatever at any time, that such a plan was in contemplation by any of the holders of the bonds referred to in your previous answer?

(Objection by counsel for defendant Salter, because question is immaterial and irrelevant.)

A. The same answer applies. I could have obtained such knowledge only as counsel, and professional honor would prevent me
from answering, but I had no such knowledge. I knew that
200 the bondholders, some of whom said they had paid more that 60c. on the dollar for their bonds, and who had received

nothing from the State for nearly thirty years felt that they had not been treated with the consideration which an honest State owed an honest creditor, and I think they would have taken any honest means to have secured the collection of a part of their debt. I did state to Governor Aycock that I thought the bondholders would do something—what it was, I did not know.

Q. Will you please give the names of those of the holders of the bonds referred to, who claim to have paid 60c. on the dollar for the same, and who you had reason to believe, and so communicated to the governor, would take steps to enforce the collection of the bonds?

(Same objection by counsel for defendant, Salter.)

A. I did not say I had reason to believe they would take steps to enforce the collection of their bonds. One of the Schaeffer Bros. told me that they had paid over 60 % for a part of their holdings of bonds. They are much the largest holders of bonds, I am informed.

Q. Did you ever suggest to any one the feasibility of making a donation of bonds to some State, with a view to having that State sue the State of North Carolina in the Supreme Court of the United States for the purpose of testing the question of whether such a plan could be successfully carried out, and the second-mortgage bonds in that way collected from the State, or the stock owned in the North Carolina Railroad Co. made available for such purposes? If you ever made such suggestion to any one, please state to whom and when.

201 (Question objected to by counsel for complainant, on the ground that it is hearsay and immaterial.)

A. Counsel asks a question, which if the answer was in the affirmative, if he were upon the witness stand, he would be the last to give, as he would not reveal anything which he had stated to his client under the inviolate seal of professional confidence. I did not make such suggestion directly, or indirectly, and therefore, I can properly answer the question.

Q. Did you see a draft of a bill intended to be introduced into the legislature of South Dakota to be entitled "An act to require the acceptance and collection of drafts, devises and bequests, donations and assignments to the State of South Dakota" before the said bill was introduced in the said State, or became a law? If you say you did, please state what you know about such bill.

(Objection by counsel for defendant Salter, because question is immaterial & irrelevant.)

A. I could have seen such bill only in my capacity as counsel, I did not see it.

Q. Did you have any knowledge that any such bill would be introduced into that legislature, acquired from any one other than some one who had employed you as counsel?

(Same objection by counsel for defendant, Salter.)

A. I did not.

F. H. BUSBEE.

Subscribed before me this — day of December, 1902.

202 WILLIAM H. WORTH, a witness produced in behalf of the defendant, Charles Salter, being first duly sworn, deposes and says, in answer to the interrogatories propounded to him by counsel for defendant, Salter, as follows:

Q. When were you treasurer of the State of North Carolina?

A. From January '95 to January 1901.

Q. I have handed you the bill of complaint in this case, and have requested you to read section 10, which is as follows:

"That during some twenty years after the so-called extension of the first-mortgage bonds by the agreement of 1880 (Exhibit C), the defendant State has been annually receiving dividends on its stock amounting to one hundred and eighty thousand dollars a year ($180,000), while the annual interest on the first-mortgage bonds has amounted to the sum of one hundred and sixty-three thousand two hundred dollars ($163,200), thus leaving an excess of sixteen thousand eight hundred dollars ($16,800) per annum for the period of twenty years, making a total of three hundred and thirty-six thousand dollars ($336,000), which has been covered into the general fund of the State treasury and has been used for the ordinary expenses of the State. And the State is now receiving dividends on its stock paid semi-annually at the rate of two hundred and ten thousand dollars ($210,000) a year, while the annual interest on the first-mortgage bonds is one hundred and sixty-three thousand two hundred
203 dollars, (163,200) a year thus showing forty-six thousand eight hundred dollars ($46,800) a year in excess of the interest on the first-mortgage bonds, which forty-six thousand eight hundred dollars ($46,800) the defendant State refuses to pay over to the second mortgagees, notwithstanding their manifest rights to this fund on the facts hereinbefore recited."

Have you read it?

A. I have.

Q. Please state whether the allegations of that section are correct or not?

A. I know they are so far as the administration that I was in from 1895 to 1901.

WILLIAM H. WORTH.

Subscribed to before me this — day of December, 1902.

THE UNITED STATES OF AMERICA,
State of North Carolina, City of Raleigh.

I, Ed. S. Battle, duly appointed by stipulation and agreement of counsel under an order issued from this court, (stipulation & order being hereto attached) commissioner to take depositions in the State of North Carolina in the above-entitled cause, do hereby certify that

the foregoing depositions were duly taken in accordance with the stipulation of counsel in this cause as above set forth; that the depositions were taken by question and answer: that said
204 depositions were taken down in shorthand by a stenographer, and typewritten transcript made therefrom: that said depositions were signed by the deponents as provided for in the foregoing stipulation: that the deponents were first duly sworn to tell the truth, the whole truth and nothing but the truth: that the depositions were taken in the office of the attorney general of the State of North Carolina in the city of Raleigh on the 6th day of November, 1902, and continued on the 7th of November, and on the 3rd of December next following, as above set forth, when finished: that the several parties to the cause were represented by counsel, as above set forth: that the several exhibits recited were offered in evidence: that the copies of the laws put in evidence are true and accurate copies of the same. I further certify that I am not counsel or relative to any party to this cause, or otherwise interested in the event of this suit.

ED. S. BATTLE,
Commissioner to Take Evidence in State of North Carolina.

Supreme Court of the United States, October Term, 1901.

THE STATE OF SOUTH DAKOTA, Complainant,
vs.
THE STATE OF NORTH CAROLINA ET AL. } No. 11.

Ordered, that the testimony in this case be taken orally, in
205 the same manner as provided for the taking of testimony in the circuit courts of the United States, sitting in equity, by rule 67 of the rules of practice in equity promulgated by this court, and that any persons or persons, duly authorized by law to take testimony, agreed upon by the parties to this case, not in default for want of an answer, may take such testimony, the same as if he had been specially appointed by this court commissioner to do so, and that in default of such agreement any justice of this court may appoint a commissioner or commissioners for that purpose; that one or more persons or commissioners may be selected or appointed each to take testimony in any named locality and each to act as if he were sole commissioner; that the time to take such testimony is limited to the first day of October next, and that the same be returned to this court and filed with the clerk thereof on or before the first Monday of October, 1902.

Per MR. CHIEF JUSTICE FULLER.

May 19, 1902.

True copy.

[Seal of the United States Supreme Court.]

Test: JAMES H. McKENNEY,
Clerk Supreme Court U. S.

(Endorsed:) (Copy) Supreme Court U. S. No. 11 or'g'l. October term, 1901. The State of South Dakota, compl't *vs.* The State of North Carolina, *et al.* Order to take testimony. Filed May 19, 1902.

206 The Supreme Court of the United States.

THE STATE OF SOUTH DAKOTA, Complainant,
vs.
THE STATE OF NORTH CAROLINA, CHARLES Salter, and Simon Rothschild, Defendants. } No. 9, Original.

It is agreed that Ed. S. Battle of Wilmington N. C. shall be appointed commissioner to take depositions in the State of North Carolina.

Any party to this suit shall be entitled to take depositions before said commissioner on ten (10) days' notice to the other party to this suit, or to their solicitors or counsel.

WHEELER H. PECKHAM,
Of Counsel for Compl't.
R. D. GILMER, *Att'y Gen'l.*
JAMES E. SHEPHERD,
Of Counsel for State of North Carolina.
D. L. RUSSELL,
Of Counsel for Defendant Charles Salter.

Endorsed: Supreme Court U. S. October term, 1902. Term No. 9, orig'l. The State of South Dakota, complainant, *vs.* The State of North Carolina *et al.* Stipulation to appoint E. S. Battle,
207 commissioner to take depositions. Filed Aug. 30, 1902.

A true copy.
Test:

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

208 EXHIBIT A.

LAWS OF 1854–'55, CHAPTER 228.

An act to incorporate the Western North Carolina Railroad Company.

SEC. 1. Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same, That for the purpose of constructing a railroad to effect a communication between the North Carolina railroad and the valley of the Mississippi, the formation of a corporate company, is hereby authorized under the name and style of the Western North Carolina Railroad Company, and when formed in compliance with the condi-

tions hereinafter prescribed, shall have a corporate existence as body politic for the term of ninety-nine years.

SEC. 2. Be it further enacted, That the said company shall have power to construct a railway with one or more tracks from the town of Salisbury, on the North Carolina railroad, passing by or as near as practicable to Statesville, in the county of Iredell, to some point on the French Broad river beyond the Blue Ridge, and if the legislature shall hereafter determine, to such point as it shall designate at a future session.

SEC. 3. Be it further enacted, That for the purpose of creating the capital stock of said company, the following persons be and they are hereby appointed general commissioners, viz: E. J. Erwin, Wm. M. Shipp, John F. Hoke, Wm. A. Lenoir, John I. Shaver, Samuel
209 F. Bell, and John Wilfong, and books for receiving subscriptions for the capital stock aforesaid shall be opened at the following places, and under the directions of the following persons, to wit: At Salisbury under the direction of J. W. Ellis, D. A. Davis, J. H. Jenkins, Wm. Murphy, A. Henderson, or any three of them; at Lincolnton L. E. Thompson, C. C. Henderson, H. W. Guion, Wm. J. Hoke, and Henry Cansler or any three of them; at Newton, M. L. McKorkle, George Setzer, Jonas Bost, Dr. Campbell, and George Wilkie, or any three of them; at Statesville, R. F. Simonton, J. F. Alexander, C. A. Carleton, A. M. Jamison, W. P. Caldwell, or any three of them; at Taylorsville, A. C. McIntosh, W. G. James, R. Watts, Alfred Carson, Devault Little, or any three of them; at Morganton, J. J. Erwin, R. C. Pearson, C. M. Avery, James M. Smyth, Thomas G. Walton, or any three of them; at Marion, Samuel Deal, J. C. Whitson, J. S. Brown, A. Higgins, Logan Burgin, or any three of them; at Rutherfordton, William Miller, Robert Twitty, Edmund Bryan, O. Bartlett, David Miller, or any three of them; at Shelby, Wm. T. Miller, Doct. Thomas Williams, Albert Holmsby, Wm. Green, A. W. Benton, or any three of them; at Mocksville, B. Bailey, A. M. Booe, Thos. M. Young, J. F. Martin, E. Gaither, or any three of them; at Asheville, N. W. Woodfin, James W. Patton, James M. Smith, W. W. McDowell, Montraville Patton, or any three of them; at Hendersonville, John Baxter, V. Ripley, D. B. Miller, J. H. Allen, M. M. Patton, or any three of them; at Lenoir, under the direction of C. C. Jones, R. B. Bogle, E. P. Miller, W. W. Lenoir, and James Harper, or any three of them; at Boone, under the direction of Johnathan Horton, Jordan Council, George N. Foulke, John Horton, and E. F. Clewell, or any three of them.

210 SEC. 4. Be it further enacted, That all persons who are or may be hereafter authorized to open books for subscription of stock by the commissioners herein appointed for that purpose, shall open said books at any time after the ratification of this act, twenty days' previous notice being given in some one or more of the public newspapers in this State, and that said books when opened, shall be kept open for the space of thirty days at least, and as long thereafter as the commissioners first above named shall direct; and that all subscriptions of stock shall be in shares of one hundred dollars, the subscribers paying at the time of making such subscriptions, the

amount of five per cent. on the same, to the person or persons authorized to receive such subscriptions, and in case of failure to pay said sum, all such subscriptions shall be void if the commissioners choose to so declare it, or they may direct it to be recovered by suit or otherwise, and upon closing the books, all such sums as shall have been thus received of subscribers on the first cash installment, shall be paid over to the general commissioners hereinbefore mentioned, by the persons receiving them, and for failure thereof, such person or persons, shall be personally liable to said general commissioners, before the organization of said company, and to the company itself, after its organization, to be recovered in the superior court of law within this State, in the county wherein such delinquent resides, or if he resides in any other State, then in any court in such State having competent jurisdiction; that the said general commissioners shall have power to call on and require all persons empowered to receive subscriptions of
211 stock at any time, and from time to time as a majority of them may think proper, to make a return of the stock by them respectively received, and to make payments of all sums made by the subscribers; that all persons receiving subscriptions of stock, shall pass a receipt to the subscriber or subscribers, for the payment of the first installment, as heretofore required to be paid, and upon their settlement with said general commissioners aforesaid, it shall be the duty of said general commissioners in like manner, to pass their receipt for all sums thus received, and such receipts shall be taken and held to be good and sufficient vouchers for the persons holding the same.

SEC. 5. Be it further enacted, That it shall be the duty of said general commissioners, to direct and authorize the keeping open of books for the subscription of stock in the manner above described, until the sum of three hundred thousand dollars, shall have been subscribed to the capital stock of said company, and the said commissioners or a majority of them, shall sign and seal a duplicate declaration to that effect, with the names of the subscribers appended, and cause one of the said duplicates to be deposited in the office of the secretary of state.

SEC. 6. Be it further enacted, That whenever the sum of three hundred thousand dollars ($300,000) shall be subscribed in manner aforesaid; the subscribers, their executors, administrators and assigns, shall be, and are hereby declared to be incorporated into a company by the name and style of "The Western North Carolina Railroad Company," and by that name, shall be capable in
212 law an- equity, of purchasing, holding, leasing and conveying estates, real, personal and mixed, and of acquiring the same by gift or devise, so far as shall be necessary for the purposes embraced within the scope, object and intent of this charter, and no further, and shall have perpetual succession, and by their corporate name, may sue and be sued, plead and be impleaded in any court of law and equity in the State of North Carolina, and may have and use a common seal, which they may alter and renew at pleasure, and may have and enjoy all other rights and immunities, which other

corporate bodies may, and of right do exercise, and may make all such by-laws, rules and regulations as are necessary for the government of the corporation, or for effecting the object for which it is created, not inconsistent with the constitution and laws of the State of North Carolina.

SEC. 7. Be it further enacted, That as soon as the sum of (300,000) three hundred thousand dollars shall have been subscribed in the manner aforesaid, it shall be the duty of the general commissioners appointed herein to appoint a time for the stockholders to meet at Salisbury which they shall cause to be previously published for the space of thirty days in one or more newspapers, as they may deem proper, at which time and place the said stockholders, in person or by proxy, shall proceed to elect four directors of the company, and to enact all such by-laws, rules and regulations as may be necessary for the government of the corporation and the transaction of its business; the persons elected directors at this meeting shall serve for the term of one year, and at this meeting the stockholders shall fix on the place or places where the sub-
213 sequent election of directors shall be made; but if the day of annual election should pass without any election of directors, the corporation shall not thereby be dissolved, but it shall be lawful on any other day to hold and make such election, in such manner as may be prescribed by the rules and by-laws of the corporation.

SEC. 8. Be it further enacted, That whenever it shall appear to the board of internal improvements of this State by a certificate signed and sealed by said general commissioners or a majority of them that the sum of three hundred thousand dollars has been subscribed for and taken, and the five per cent. paid in thereon, the said board of internal improvements shall be and they are hereby authorized and required to direct the treasurer of the State to subscribe on behalf of the State for the stock in said company to the amount of six hundred thousand dollars in the capital stock of said company.

SEC. 9. Be it further enacted, That upon the subscription of six hundred thousand dollars as hereinbefore provided, by the treasurer, under the direction of the board of internal improvements, the State shall appoint eight directors in said company, who shall be appointed by the governor, by and with the advice and consent of the council of State.

SEC. 10. Be it further enacted, That as soon as the company shall be organized as aforesaid, the board of directors shall proceed to locate and have constructed as speedily as possible, on the route they may deem best, a railroad with one or more tracks, to be used with steam power, which may thereafter be extended in the manner hereinafter provided, (from) the town of Salisbury, on the North Carolina
214 railroad, connecting with the same, and of the same guage, and proceeding westward to the terminus aforesaid, and as soon as the first division of said road shall have been completed, it shall be equipped for the transportation of passengers and freight, and all necessary warehouses, water stations, and buildings shall be erected, so that such division shall be put in full operation before the State shall be called upon to subscribe any further sum; and two-thirds

of the net proceeds of such part so completed shall be paid into the treasury semi-annually, to be applied in discharge of the interest on the bonds issued by the State for said road, and the other third of net proceeds shall be paid to the individual stockholders in proportion to the stock of each; and whenever such division shall have been completed and in full operation, and one-third of the estimated cost of the second division shall have been subscribed by solvent persons, and so certified as provided in section 8 of this act, the State shall subscribe the remaining two-thirds of the estimated cost of such division, and shall pay *pro rata* with individual stockholders (such payment by them being in cash or labor); and when said second division shall have been completed and in full operation, the net proceeds shall be applied as hereinafter prescribed; when the said first and second divisions shall have been completed and in full operation, and one-third of the estimated cost for completing the remaining division shall have been subscribed by solvent persons, certified as aforesaid, two-thirds of the estimated cost thereof for completing the said road to its western terminus shall be subscribed by the State; and when the same shall be put in full
215 operation, the net proceeds shall be applied as aforesaid, and the State shall pay her share of the subscription *pro rata* as aforesaid.

SEC. 11. Be it further enacted, That the manner and time of the payment of the subscription on the part of the State shall be as follows, namely: The one-fourth part as soon as the private stockholders shall pay, either in cash or labor the one-fourth part of their subscription, and the payment thereof is duly certified to the board of internal improvements by a certificate under the seal of said company, signed by their treasurer and countersigned by their president, and the balance either in part or in whole whenever the payment of the *pro rata* amount, either in cash or labor, shall be made by the private stockholders, and duly certified to the board of internal improvements in manner and form aforenamed: Provided, that the State shall not be called upon to pay an amount, at any time, of less than fifty thousand dollars.

SEC. 12. Be it further enacted, That the affairs of the company shall be managed and directed by a general board to consist of twelve directors to be elected and appointed as hereinafter provided, at the first and subsequent general annual meetings; provided, that no person shall be eligible as president or director of said company, unless he be a resident citizen of this State, and the *bona fide* owner of at least five shares of stock in said company.

SEC. 13. Be it further enacted, That the election of the directors shall be by ballot, each stockholder having as many votes as
216 he has shares in the stock of said company, and the person having a majority of all the votes polled, shall be considered duly elected; provided, that no person shall be eligible to serve as director in said board, who is not a holder of five shares of stock in said company.

SEC. 14. Be it further enacted, That the president of the company

shall be elected by the directors from among their own number, in such manner as the regulations of the company shall provide.

SEC. 15. Be it further enacted, That at the first general meeting of the stockholders, directed to be called under the seventh section of this act, a majority of all the shares subscribed shall be represented before proceeding to business; and if a sufficient number do not appear on the day appointed, those who do attend shall have power to adjourn from time to time, until a regular meeting shall thus be formed; and at such meeting the stockholders may provide a by-law, as to the number of stockholders and amount of stock to be held by them, which shall constitute a quorum for the transaction of business and all subsequent regular, or occasional meetings of stockholders.

SEC. 16. Be it further enacted, That — all elections and upon all votes taken in any general meeting of the stockholders, upon any by-law, or any of the affairs of said company, each share of stock shall be entitled to one vote; and that any stockholder in said company may vote by proxy, and proxies may be verified in such manner as the stockholders by law may prescribe.

SEC. 17. Be it further enacted, That the general commissioners shall make their returns of the shares of stock sub-
217 scribed for at the first general meeting of stockholders, and pay over to the directors elected at said meeting or their authorized agent, all sums of money received from subscribers; and for failure thereof, shall be liable to said company to be recovered at the suit of said company in any of the superior courts of law in this State, within the county where such delinquent or delinquents may reside, and in like manner from said delinquent or delinquents' executors or administrators in case of his death.

SEC. 18. Be it further enacted, That the board of directors may fill all vacancies which may occur in it during the period for which they have been elected, and in the absence of the president, may appoint one *pro tempore* from among their number.

SEC. 19. Be it further enacted, That all contracts or agreements authenticated by the president and secretary of the board of directors shall be binding on the company without a seal, or such a mode of authentication may be used as the company by their by-laws may adopt.

SEC. 20. Be it further enacted, That the board of directors may call for the payment of the sums subscribed as stock in said company, in such installments as the interests of said company may in their opinion require; the call for payment shall be published in one or more newspapers published in this State for at least one month before the day of payment, and on failure of any stockholder to pay each installment as thus required, the directors may sell at public auction, on a previous notice of ten days, for cash, all stock
218 subscribed *ro* in said company by such stockholders and convey the same to the purchaser at said sale; and if the said sale of stock do not produce sufficient to pay off the incidental expenses of said sale and the entire amount due to said company for such subscription of stock, then, and in that case, the whole bal-

ance shall be held as due at once to said company, and may be recovered of such stockholder or his executors, administrators, or assigns at the suit of said company, either by summary motion in any court of superior jurisdiction in the county where the delinquent resides, on a previous notice of ten days to such delinquent subscriber, or by action of assumpsit in any court of competent jurisdiction, or by a warrant before a justice of the peace, when the sum does not exceed one hundred dollars, and in case of the assignment of stock before the whole amount has been paid to the company, then for all sums due on such stock, both the original subscribers and the first, and all subsequent assignees, shall be liable to the company, and the same may be recovered as above described.

SEC. 21. Be it further enacted, That the debt of stockholders due to the company for the stock therein, either as original proprietors or as first or subsequent assignees, shall be considered as of equal dignity with judgments in the distribution of assets of a deceased stockholder by his personal representatives.

SEC. —. Be it further enacted, That said company shall issue certificates of stock to its members, and said stock may be transferred in such manner and form as may be directed by the by-laws of the company.

SEC. 23. Be it further enacted, That said company may at
219 *may at* any time increase its capital to a sum sufficient to complete said road, not to exceed ($6,000,000) six millions of dollars.

SEC. 24. Be it further enacted, That the board of directors shall once in every year at least, make a full report of the state of the company and its affairs, to a general meeting of the stockholders, and oftener if required by law, and said report shall be laid before the board of internal improvements, and said board of directors shall have power to call a general meeting of the stockholders when the board may deem it expedient, and the company may provide by their by-laws for occasional meetings being called, and prescribe the mode thereof.

SEC. 25. Be it further enacted, That the said company shall have the exclusive right of conveyance, transportation of persons, goods, merchandise and produce, over the said railroad, to be by them constructed, at such charges as may be fixed on by the board of directors.

SEC. 26. Be it further enacted, That said company may, when they see fit *to form* (farm) out their right of transportation over said railroad, subject to the rules above mentioned; and the said company and every one who may have received — from the right of transportation of goods, wares and merchandise, over the said railroad, shall be deemed and taken to be a common carrier, as respects all goods, wares, produce and merchandise, intrusted with them for transportation.

SEC. 27. Be it further enacted, That the said company may pur-
chase, have and hold in fee, or for a term of years, any lands,
220 tenements and hereditaments, which may be necessary for the said road, or the appurtenances thereof, or for the erec-

tion of depositories, storehouses, houses for the officers, servants, or agents of the company, or for the workshops, or foundaries to be used for the said company, for *for* procuring stone or other materials, necessary for said company, in the construction or repairs of the road, or for effecting transportation thereon, and for no other purpose.

SEC. 28. Be it further enacted, That the company shall have the right when necessary, to construct the said road across, or along any public road; or water-course; provided, that the said company shall not obstruct any public road without constructing another equally as good, and other roads may hereafter connect with or across the same, upon such terms as the General Assembly may prescribe.

SEC. 29. Be it further enacted, That when any lands for right of way may be required by said company for the purpose of constructing their road, or for any of the uses described in section twenty-seven of this act, and for the want of agreement as to the value thereof, or from any other cause, the same cannot be purchased from the owner or owners, the said company shall have the same powers to condemn all such lands belonging to individuals or corporations as may be needed for the aforenamed purposes, as were granted to and conferred upon the North Carolina Railroad Company by their act of incorporation, and shall proceed to condemn such lands in the same manner and to the same extent under the like rules, restrictions and conditions as are prescribed in the charter aforesaid, for the government of the said
221 company, and the said company shall be entitled to hold in fee-simple all lands belonging to the State, over and through which the said road may pass to an extent not exceeding one hundred feet on either side of said road; and in the absence of any contract or contracts in relation to lands through which said road may pass, it shall be presumed that the land over which said road may be constructed, together with one hundred feet on each side thereof, has been granted by the owner or owners to the company, and the said company shall have good right and title thereto, and shall have, hold and enjoy the same so long as it shall be used for the purposes of said road and no longer, unless the owner or owners shall apply for an assessment of the value of said lands as hereinbefore directed, within two years next after that part of said road has been located; and in case the owner or owners of such land, or those claiming under him, her or them shall not apply within two years from the time aforesaid, he, she or they shall be forever barred from recovering the same or having an assessment or compensation therefor: Provided that nothing herein contained shall effect the rights of infants, *feme coverts*, persons *non compos* or beyond seas, until two years after the removal of their respectives disabilities, and the same and all the estate aforesaid, shall be exempt from taxation until the dividends of profits of said company shall exceed six per centum per annum.

SEC. 30. Be it further enacted, That if any person or persons shall intrude upon said railroad by any manner of use thereof, of the

rights and privileges connected therewith without permission
222 or contrary to the will of said company, he, she or they may be indicted for a misdemeanor, and upon conviction, may be fined, and imprisoned by any court of competent jurisdiction in this State.

SEC. 31. Be it further enacted, That if any person shall willfully and maliciously destroy or in any manner hurt, or damage, or obstruct, or shall willfully and maliciously cause, aid or assist, or counsel any other person or persons to destroy, or in any manner to hurt, damage or obstruct, the said railroad, or any bridge, water tank, warehouse, or any other property of said company or any locomotive or car used for or in transportation thereon, such person or persons so offending, shall be liable to be indicted therefor, and on conviction, shall be imprisoned not more than six nor less than one month, and pay a fine not exceeding five hundred dollars, nor less than twenty dollars, at the discretion of the court before which said conviction shall take place, and shall be further liable to pay all expenses of repairing the same, and it shall not be competent for any person so offending against the provisions of this clause to defend himself by pleading or giving in evidence, that he was the owner, agent or servant of the owner of the land where such destruction, damage, injury or obstruction was done at the time the same was caused to be done.

SEC. 32. Be it further enacted, That every obstruction to the safe and free passage of vehicles on said road or its branches, shall be deemed a public nuisance, and may be abated as such, by any officer, agent or servant of said company, and the person causing such obstruction, may be indicted and punished for a misdemeanor.

223 SEC. 33. Be it further enacted, That the said company shall have the right to take, at the storehouses erected by them on said railroad, or connected therewith or its branches, goods, wares, merchandise and produce intended for transportation, prescribe the rules of priority, and charge and receive such just compensation for storage as they, by rules may establish, (which they shall cause to be published,) or as may be fixed by agreement with the owner, which may be distinct from the rates of transportation.

SEC. 34. Be it further enacted, That the profits of the company, or so much thereof as the board of directors may deem advisable, shall, when the affairs of the company will admit, be quarterly or semi-annually divided among the stockholders, in proportion to the stock each may own.

SEC. 35. Be it further enacted, That as soon as it may become necessary to borrow the money for the payment of the subscription by this act authorized, the public treasurer shall issue coupon bonds, signed by himself, and countersigned by the comptroller, in sums not less than five hundred dollars each, pledging the State for the payment of the sum therein mentioned, with interest thereon at the rate of interest not exceeding six per cent. per annum, payable semi-annually, at such times and places as the treasurer may appoint, the principle of which bonds, shall be redeemable at the end of

thirty years from the time the same were issued; but no greater (number) of such certificates shall be issued at any one time, than may be sufficient to meet the installments required to be paid by the State at that time.

SEC. 36. Be it further enacted, That the comptroller shall
224 register such bonds at large, in a book to be kept for that purpose, at the time he countersigns the same, and when he delivers the same to the public treasurer, he shall charge in his books with the amount thereof, and also with all sums, if any, which the public treasurer may obtain by way of premium on the sale of said bonds, an account of which the public treasurer shall render to the comptroller, as soon as negotiations, from time to time for the sale of said bonds are closed.

SEC. 37. Be it further enacted, That so soon as it shall become necessary to issue the bonds aforesaid, the public treasurer shall advertise in one or more newspapers as he may think best, and invite sealed proposals for such amount of the aforesaid subscription as may be wanted at any one time, and it shall be his duty to accept those terms which may be most advantageous to the State: Provided, that in no event shall any of the said bonds be sold for less than their par value; and any premium which may be obtained on the sale of said certificates, shall be placed in the public treasury and used as other public funds, and kept or invested to pay the interest on the debt hereby authorized.

SEC. 38. Be it further enacted, That as security for the redemption of said bonds, the public faith of the State of North Carolina is hereby pledged to the holders thereof; and in addition thereto, all the stock held by the State in the Western North Carolina Railroad Company hereby created, shall be and the same is hereby pledged for that purpose, and any dividends of profits which may from time to time be declared, shall be applied to the payment of the interest
225 accruing on said bonds: but until such dividends or profits may be declared, it shall be the duty of the treasurer, and he is hereby authorized and directed to pay all such interest as the same may accrue, out of any money in the treasury not otherwise appropriated.

SEC. 39. Be it further enacted, That the bonds hereby authorized to be issued, shall have coupons attached to them, expressing on the face of them the amount of the semi-annual interest due on such bond, and the said bonds shall and may be transferrable by the holders thereof by delivery only.

SEC. 40. Be it further enacted, That it shall be the duty of the public treasurer to enter in a book to be kept for that purpose, a memorandum of such bonds as may be issued by virtue of this act, the number and date of issue, when and where payable, to whom issued or to whom sold, and — what premium, if any, the same are sold by him.

SEC. 41. Be it further enacted, That at all general meetings of the stockholders after the subscription hereinbefore provided to be made on the part of the State, shall be made, the State shall be represented by an agent or proxy appointed by the governor; and such

agent or proxy shall be entitled in the general meeting aforesaid to vote on all questions according to the State's stock except in the election of directors by the individual stockholders; and any stockholder or person, acting by proxy, who may offer to vote on any stock transferred, may be required if a stockholder present to swear that he is, or if by proxy that the person he represents
226 he believes to be the *bona fide* owner of such stock, otherwise such vote shall not be received, and on the death of any stockholder, his legal representative shall be entitled to vote either in person or by proxy; provided, that the State shall be entitled to a *pro rata* vote on her stock of one-third, according to the representation of individual stock in the meeting.

SEC. 42. Be it further enacted, That whenever the said company shall have completed, equipped and in full operation with one or more tracks for the transportation of passengers and freight, the first division of said road, and all necessary warehouses, water stations, and buildings, and the aforenamed subscription of nine hundred thousand dollars by the stockholders of the State expended, the board of directors shall at once proceed to cause books to be opened by such persons as they may appoint and at such places as they may deem best, to secure the further subscription of three hundred thousand dollars to the capital stock of said company, which may be made under such rules, requirements and conditions as shall be prescribed by the board of directors; and the persons so appointed shall make their return to the board of directors.

SEC. 43. Be it further enacted, That whenever it shall appear to the board of internal improvements of this State, by a certificate under the seal of said company, signed by their secretary, and countersigned by their president, that the said further sum of three hundred thousand dollars has been subscribed to the capital stock of said company, the said board of internal improvements shall be and they are hereby authorized and required to direct the
227 treasurer of the State to make the further subscription on behalf of the State for stock in said company, to the amount of six hundred thousand dollars in the capital stock of said company.

SEC. 44. Be it further enacted, That the manner and time of payment of the further subscription on the part of the State, shall be the same as are prescribed in section twelve of this act, and under the same conditions, restriction and certification as therein prescribed for the payment of a subscription before provided to be made on the aforenamed first subscription of said amount on behalf of the State to the capital stock in said company.

SEC. 45. Be it further enacted, That whenever and as soon as the said company shall have completed, equipped and in full operation, with one or more tracks for the transportation of passengers and freight, the second division of said railway, the board of directors of said company shall proceed in the same manner, and under the same provisions, regulations, restrictions and conditions as are prescribed in section forty-two forty-three and forty-four of this act to effect the construction of each and every consecutive division of

said railway, throughout the line located as provided in section ten of this act, and the same provisions, regulations, restrictions and conditions expressed in said sections forty-two, forty-three and forty-four of this act as aforesaid, shall be in full force when applied for the construction of each and every consecutive division of said railway throughout said line, located as provided in section ten of this act: Provided, however, that should the first subscription provided for in the seventh section of this act, — be taken by individuals, on
the first division, be four hundred thousand dollars, and the
228 five per cent. thereon paid, and the certificates thereof made
as in said seventh section mentioned, then and in that case the first subscription on the part of the treasurer of the State, for the first division, shall be eight hundred thousand dollars.

SEC. 46. Be it further enacted, That the following officers, servants and persons in the actual employment of the said company, be, and they are hereby exempted from the performance of jury and ordinary military duty: the president and treasurer of the board of directors, the chief and assistant engineers, secretaries and accountants of the company, keeper of depositories, guards stationed on the road to protect it from injury, and such persons as may be working the locomotive engines and traveling with the cars, for the purpose of attending to the transportation of passengers, produce and merchandise on the road.

SEC. 47. Be it further enacted, That any county through which the said road passes, may subscribe for any amount of the capital stock in said company, as a majority of the voters of said county may approve, for which purpose the court of pleas and quarter sessions of said counties, are hereby authorized to hold an election at the usual time- and places of voting for members of the General Assembly.

SEC. 48. Be it further enacted, That it shall be the duty of the president and directors of said company, during the first week in December, of each and every year, to transmit to the governor, to be by him laid before the General Assembly, at each biennial session, a correct statement of the receipts and expenditures of said company, during the year preceding, and also the amount of its debts. (Ratified the 15th day of February, 1855.)

229 EXHIBIT B.

LAWS OF 1866–'67, CHAPTER 106.

An act to enhance the value of the bonds to be issued for the completion of the Western North Carolina railroad and for other purposes.

Whereas, the legislature of North Carolina, at its session of 1854–'55, passed "An act, entitled An act to incorporate the Western North Carolina Railroad Co.," and at its session of 1860–'61, and act, entitled "An act to amend the charter of the Western North Carolina Railroad Company;" and whereas, by the combined force of said acts, the faith of the State of North Carolina was pledged for the pay-

ment of four millions of dollars in bonds of the State, a portion of which have already been issued; and, whereas, it is manifestly to the interest of the people of the whole State, that the residue of the bonds when issued, shall command a high price in market; therefore,

SECTION 1. Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same, That the public treasurer be, and he is hereby, authorized and directed, whenever it shall become his duty under the provisions of said acts, passed at the sessions of 1854–'55 and 1860–'61, to issue bonds of the State to the amount of fifty thousand dollars, or more, to mortgage an equal amount of the stock which the State now holds in the North Carolina railroad, as collateral security, for the payment of said bonds, and to execute and deliver, with each
230 several bonds, a deed of mortgage for an equal amount of stock to said North Carolina railroad, said mortgage to be signed by the treasurer, and countersigned by the comptroller, to constitute a part of said bond, and to be transferrable in like manner with it, as provided in the charter of said Western North Carolina Railroad Company; and, further that such mortgages shall have all the force and effect in law and equity, of registered mortgages without actual registry.

SEC. 2. Be it further enacted, That the president and directors of said Western North Carolina Railroad Company be, and they are hereby, authorized and empowered, to issue bonds of the company, running for such term of years as they may deem expedient, and bearing interest at a rate not greater than eight per cent. per annum, and to make, execute and deliver, a deed or deeds of mortgage, conveying the whole or a portion of the right, title and interest of the company, in any or all the estate, both real and personal, belonging to said company, or in any manner pertaining to the same, to the purchaser or purchasers of said bonds of the company, and conditioned for securing the payment of said bonds at maturity; and also to pledge the profits of said company, or so much thereof, as may be necessary, for the payment of the interest on said bonds as it falls due; and said bonds shall be issued by said president and directors, whenever it shall appear to them necessary, for the completion of said road, to raise other funds in addition to the State's subscription, and the proceeds arising from the sale of said bonds shall be applied for the purpose of finishing the road to its western termini.

231 SEC. 3. Be it further enacted, That this act shall be in force from and after its ratification.

Ratified 19th day of December, A. D., 1866.

232 EXHIBIT C.

LAWS OF 1879, CHAPTER 138.

An act to adjust and renew a portion of the State debt.

The General Assembly of North Carolina do enact:

SECTION 1. That in order to renew and adjust a portion of the State debt incurred to aid in the construction of the North Carolina railroad, and obtain an extension of time of paying the same, and reduce the rate of interest thereon, the governor of the State is hereby authorized to appoint three commissioners for the purpose of negotiating with the holders of the said bonds and contracting with them for a renewal of the said debt on terms which may be advantageous to the State and which are approved by the governor and public treasurer.

SEC. 2. The said commissioners shall be and they are hereby authorized, with the advice and consent of said governor and public treasurer, to contract and agree with holders of said old bonds for the renewal of the same with new bonds, to be issued under the provisions of this act, upon such terms as may be agreed on by and between the said commissioners and the holders of said bonds.

SEC. 3. The said commissioners shall issue to each and every person delivering to them such old bonds in accordance with the terms of renewal which may be agreed on, a certificate which shall state the date, amount and number of the bonds and coupons delivered to them by each person, and number and amount of new bonds which such person may be entitled to receive in re-
233 newal thereof. They shall file a copy of said certificate with the public treasurer immediately after the issue thereof.

SEC. 4. The said commissioners, with the advice and consent of the governor and public treasurer, shall have power to sell said new bonds at par and invest the proceeds thereof in the purchase of the said old bonds: Provided, that no sale of such new bonds shall be made by said commissioners unless the proceeds thereof can be immediately invested in the purchase of said old bonds at *at* a rate not greater than that at which they are being exchanged for new bonds, and not more than fifty thousand dollars of said bonds shall be sold at the same time, nor shall a future sale of bonds be made until the proceeds of previous sales have been invested in the purchase of bonds as aforesaid. Upon the sale of such bonds the commissioners shall issue a certificate to the purchaser thereof, stating the number and amount of such bonds to which such purchaser is entitled.

SEC. 5. Upon presentation of said certificate to the public treasurer he shall deliver to the owner thereof the number and amount of State bonds to which he may be entitled according to said certificate, and for the purpose of effecting the renewal of said bonds and carrying out the purpose of this act, the public treasurer is hereby authorized and directed to issue bonds of the State, payable forty

years (40) from the first day of April, anno Domini one thousand eight hundred and seventy-nine, bearing interest from the first day of April one thousand eight hundred and seventy-nine, at such rate as may be agreed upon, not to exceed six per cent. per annum, payable semi-annually on the first day of April and October
234 of each and every year until the principle shall become due.

SEC. 6. The said bonds shall be coupon bonds of the denomination of fifty, one hundred, five hundred, and one thousand dollars each, and shall be signed by the governor and public treasurer, and shall be sealed with the great seal of the State; coupons thereon may be signed by (the) treasurer alone, or have a fac-simile of his signature printed, engraved or lithographed thereon, and the said bonds and coupons shall in all other respects be in such form as the treasurer may direct, and shall express on their face that they are issued in renewal of said bonds; and the coupons thereon shall after maturity be receivable in payment of all taxes, debts, dues, licenses, fines and demands due the State, of every kind whatsoever, which shall be expressed on the face thereof.

SEC. 7. The public treasurer, before delivering any of said bonds under the provisions of this act, shall record in a well-bound book an accurate account and descriptive list of the said bonds, which shall embrace the date, amount and number thereof, and the name of the person to whom issued, and shall receive and cancel the certificate issued by said commissioners on which such bonds are issued by him; but no bonds shall be issued by the public treasurer but in execution of the provisions of this act.

SEC. 8. The said new bonds and coupons shall be exempt from all taxation whatsoever, State, county and municipal, general and special, and the same shall be expressed on the face thereof; and shall in all respects stand in the place of and be entitled to the
235 same securities as are the old bonds and coupons aforesaid, and shall have the same lien on the stock of the State in the said railroad company which the said old bonds and coupons now have; and the public treasurer shall apply the dividends received by the State on its stock in said company to the payment of the coupons on said new bonds.

SEC. 9. It shall be lawful for any executor, administrator, guardian, trustee, and all persons acting in a fiduciary character, holding any of the bonds hereby authorized to be exchanged, to make the exchange provided for in this act for the bonds herein authorized to be issued; and they shall be absolved from liability or responsibility to any person having any interest in such bonds on account of such transfer and exchange; and they shall have the power to invest any trust fund held by them in the bonds authorized to be issued by this act, and the same shall be taken and regarded in all the courts of this State as a good, legal and valid investment of such trust funds by such fiduciary.

SEC. 10. The said commissioners shall hold all the bonds and coupons delivered to or purchased by them in trust for the payment of the principle and interest on the said new bonds, and shall col-

lect and receive all payments and dividends paid and made on said old bonds and coupons so held by them from any person authorized to pay the same; and said commissioners shall pay the amounts thus received to the public treasurer, and they shall be applied by him to the payment of the interest on the new bonds issued in pursuance of this act. The said old bonds shall not be cancelled, but shall remain in force until the governor shall direct the same
236 to be delivered to the public treasurer for cancellation, at which time the said bonds shall be cancelled by the public treasurer in the presence of the governor; and they shall certify under their hands the number, amount, and date of bonds and coupons cancelled by them, which certificate shall be safely kept in the office of the public treasurer.

SEC. 11. The commissioners hereby authorized to be appointed shall enter into bonds, payable to the State, in the penal sum of fifty thousand dollars, with good security, to be accepted by the public treasurer, and conditioned for the faithful performance of their duties, and shall receive as compensation for their services, a commission of one half of one per cent. on the amount of all bonds purchased by them, to be paid by the person or persons from whom the same may be purchased, and shall in no case receive any compensation from the State.

SEC. 12. In case of the death, resignation or removal of the said commissioners, or either of them, the governor shall have the power to appoint other persons to fill such vacancies.

SEC. 13. This act shall be in force from and after its ratification.

Ratified the 14th day of March, A. D. 1879.

237 EXHIBIT D.

LAWS OF 1879, CHAPTER 98.

An act to compromise, commute, and settle the State debt.

The General Assembly of North Carolina do enact:

SECTION 1. That when any person or persons, holding and owning any bond or bonds of the State of North Carolina, issued in pursuance of any act of assembly, passed at any time before the 20th day of May, 1861, exclusive of bonds issued for the construction of the North Carolina railroad, or in pursuance of the act of the General Assembly, passed at its session in 1865, it being chapter 3 of the Laws of 1865, or in pursuance of an act passed by the General Assembly at its session in eighteen hundred and sixty-seven it being chapter fifty-six of the laws of eighteen hundred and sixty-seven, or in pursuance of an act entitled "An act to provide for the payment of the State debt contracted before the war," ratified on the tenth day of March, eighteen hundred and sixty-six, or in pursuance of an act entitled "An act to provide for funding the matured interest on the public debt," ratified the 10th day of August anno Domini, eighteen hundred and sixty-eight; or any registered certificate or certificates belonging to the board of education, issued in pursuance

of an act of the General Assembly of eighteen hundred and sixty-seven, shall surrender and deliver such bond or bonds, with the coupons attached thereto, or registered certificate or certificates to the treasurer of the State, then and in that case, it shall be the duty of the treasurer of the State, and he is hereby required to issue and deliver to the person surrendering such bond or bonds, certificate or certificates, a new bond or bonds of the State, due and payable thirty years from the first day of July, anno Domini eighteen hundred and eighty, bearing interest from date at the rate of four per cent. per annum, payable semi-annually, on the first day of January and July in each successive year, at the office of the public treasurer.

238

SEC. 2. The said bonds are to be coupon bonds of the denomination of fifty dollars, one hundred dollars, and one thousand dollars, and are to be numbered from one upward, in accordance with the order of issue. They shall be signed by the governor and treasurer, and sealed with the great seal of the State; and the coupons thereon may be signed by the treasurer alone or have a fac-simile of his signature printed, engraved or lithographed thereon.

SEC. 3. The said bonds shall be exempt from all State, county or corporate taxation or assessment direct or indirect, general or special, whether imposed for the purposes of general revenue or otherwise. The said coupons shall be receivable in payment of any and all State taxes, and the same shall be expressed on the face of each coupon; the coupons shall bear the same number as the bonds to which they are attached, and in addition be numbered from one upwards, in accordance with the date of their maturity.

SEC. 4. These bonds shall be exchanged for the old bonds of the State mentioned in the first section of this act at the following rates: Class 1.—For the bonds issued before the twentieth day of ——, eighteen hundred and sixty-one, forty per cent. of the principle of the bond or bonds so surrendered.

239

Class 2.—For the bonds issued since the close of the war, by authority of acts passed before the war to aid in the construction of the Western North Carolina railroad and the bonds issued in pursuance of the said act of assembly of eighteen hundred and sixty-five, chapter three, and act of assembly eighteen hundred and sixty-seven, chapter fifty-six; the bonds issued October first, eighteen hundred and sixty-one, by authority of act of eighteen hundred and sixty-one, chapter one hundred and thirty-seven, for Western (Coalfield) railroad, the bonds issued October first, eighteen hundred and sixty-one, by authority of act- eighteen hundred and fifty-four and fifty-five, chapter two hundred and twenty-eight, section thirty-five, and resolution September the twelfth, eighteen hundred and sixty-one, and the said registered certificates of the literary fund, for the bonds issued July the first, eighteen hundred and sixty-two, by authority of act- of eighteen hundred and sixty and sixty-one, chapter one hundred and forty-two, for the construction of the Wilmington, Charlotte and Rutherford railroad, twenty-five per cent. of the principal of the bonds or certificates so surrendered.

Class 3.—And those issued in pursuance of the said funding acts

of March tenth, eighteen hundred and sixty-six, and August twentieth, eighteen hundred and sixty-eight, fifteen per centum of the principal of the bond or bonds so surrendered: Provided, that all bonds issued in exchange for the new bonds shall be surrendered with all the coupons attached.

SEC. 5. The bonds so to be issued shall be in the usual
240 form of bonds of this State, except as modified and provided by this act, and shall have printed on the face of the same the words "Issued in pursuance of an act entitled An act to compromise, commute and settle the State debt," ratified the — day of —— anno Domini one thousand eight hundred and seventy-nine, and in large red letters, "The consolidated debt of the State."

SEC. 6. That all State taxes levied and collected from professions, trades, incomes, merchants, dealers in cigars, and three-fourths of all the taxes collected from wholesale and retail dealers in spirituous vinous and malt liquors shall be held and applied to the payment of the interest on said bonds, and the provisions of this section shall be deemed and taken to be a material part of the consideration for which the bonds of the State shall or may be surrendered.

SEC. 7. That if the whole fund raised by such taxes shall not in any one year be required to pay such accruing interest, then and in that case it shall be the duty of the treasurer, with the sanction of the governor and the auditor to buy with the surplus such of the consolidated bonds as he can buy at the lowest price after thirty days' advertisement in at least two papers published in Raleigh, and he shall forthwith cancel any such bonds so purchased.

SEC. 8. That the treasurer shall provide a substantial bound book for the purpose, in which he shall make a correct descriptive list of the bonds so surrendered, which list shall embrace the number, date and amount of each, and the purpose for which the same was issued, when this can be ascertained, and the names of the
241 persons surrendering the same, and after such list shall be made, such surrendered bonds being ascertained to be present, shall be consumed by fire in the presence of the governor, the treasurer, the auditor, the attorney general, the secretary of state and superintendent of public instruction, who shall each certify under his hand respectively in such book that he saw such described bonds so consumed and destroyed.

SEC. 9. That the treasurer shall provide a well-bound book, in which shall be kept an accurate account and descriptive list of the new bonds to be issued, and such descriptive list shall embrace the date, number and amount of such bond or bonds, for which the same issued and the name of the person to whom issued.

SEC. 10. That it shall be lawful for any executor, administrator, guardian, trustee, director of any corporation, and any and all other persons acting in a fiduciary capacity holding bonds of the State, to make the exchange provided in this act, and they shall be absolved from all liability on account of said exchange.

SEC. 11. The provisions of this act for the exchange and issue of bonds shall continue in force until the first day of January, anno Domini one thousand eight hundred and eighty-two.

SEC. 12. That as a further provision for the purpose of paying the interest on these said new bonds, if the taxes for any one year upon the subject of taxation hereinbefore mentioned shall be insufficient to pay said interest, then and in that case the public treasurer shall be authorized to apply any funds in the treasury not
242 otherwise appropriated to that purpose.

SEC. 13. That in the event that the taxes collected in any one year upon the aforesaid subjects of taxation, and the funds not otherwise appropriated in the treasury when added together shall be inadequate to pay said interest, then and in that case, and in order to provide for the deficiency, the public treasurer be and he is hereby authorized to issue coupon bonds of this State of the denomination of five hundred dollars bearing date of the first day of October or April of the year of the issue, according as one or the other of said dates shall be nearest in point of time to the date of the issue. Said bonds shall be payable forty years after date, but redeemable after ten years at the option of the State, with interest at the rate of six per centum per annum, payable semi-annually on the first days of April and October. Said bonds shall bear upon their face in red letters the words "contingent bonds," and shall be numbered from one upwards in accordance with the order of their issue. They shall be signed by the governor and treasurer and sealed with the great seal of the State; but the coupons thereon may be signed by the treasurer alone, or have a fac-simile of his signature printed, engraved or lithographed thereon. The said bonds and coupons shall be exempt from all State, county or corporate taxation or assessment, direct or indirect, general or special, whether imposed for purposes of general revenue or otherwise, and they shall be lawful investments by all executors, administrators, guardians, and fiduciaries generally. The coupons on said bonds shall bear the same number as the bonds to which they are attached, and shall in addition
243 be numbered from one upwards in accordance with the date of their maturity, and they shall be and shall so express upon their face that they are receivable at and after maturity in payment of all taxes, debts, demands and dues to the State of every nature and kind whatsoever.

SEC. 14. That the public treasurer shall be authorized to sell so many of said bonds at par as shall be necessary to provide for the deficiencies aforesaid: Provided, however, that the public treasurer shall not issue and sell in the aggregate more than six hundred of these bonds.

SEC. 15. That all the provisions of this act for paying the interest on the consolidated bonds shall apply as well to the payment of the interest of these said contingent bonds.

SEC. 16. That for the purpose of carrying out the provisions of this act in relation to the furnishing of proper blank bonds and coupons, the public treasurer is authorized with the approval of the governor, to use any funds not otherwise appropriated in the treasury, not exceeding the sum of five thousand dollars.

SEC. 17. That the public treasurer is authorized to give public

notice of this plan for a settlement of the State's indebtedness by advertising in such newspapers as he may select.

SEC. 18. That this act shall be in force from and after its ratification.

Ratified the 4th day of March, A. D. 1879.

244

EXHIBIT E.

LAWS OF 1848–'49, CHAPTER 82.

An act to incorporate the North Carolina Railroad Company.

Section

1 Incorporates company with capital of $3,000,000.
2 Route of road, from Wilmington road to Charlotte.
3 Appoints commissioners for creating stock and opening books of subscription.
4 Books, when and how long to be kept open, amount of shares, five dollars of which to be paid down, to be paid over to general commissioners.
5 Duty of general commissioners in keeping open books, and when $1,000,000 shall be subscribed.
6, 7 Corporate rights and powers.—Notices of process.
8 Provision for first and subsequent general meetings, election of directors, &c.
9, 10, 11, 12, 13 Number of, and manner of voting for directors, election of president, and quorum at general meetings, votes and proxies.
14 Return to be made by general commissioners, and penalty.
15 Vacancies in board, to be filled by directors.
16 Authentication of contracts.
17 Construction and use of road, when any section is completed.
18 Right and charges for transportation of goods or passengers.
19 Company may farm out right, and made common carrier.

245

20 Manner of calling for and enforcing payments of stock.
21 Debt of deceased stockholders, equal dignity with judgments.
22 Certificates of stock shall be issued; and how transferred.
23 Capital may be increased, and how.
24 Directors to make annual report, and may call meetings.
25 Company may purchase and hold land.
26 May cross roads or streams. Proviso.
27 Proceedings in valuing land.
28 Number of feet of land condemned.
29 Absence of contract for land, provision for.
30 Land not heretofore granted, provision for.
31 and 32 Penalties for intrusion and malicious injuries.
33, 34 and 35 Of obstructions of road, storage and carriage of goods and dividends.
36 Provides for subscription on behalf of the State.

37 and 38 Provide for borrowing, and manner of borrowing money.
39 Duties of comptroller and treasurer relative to registering certificates.
40 Treasurer to advertise for proposals, &c.
41 and 42 Pledge faith of State, and make certificates transferrable.
43 and 44 Appointment of State directors, and officers exempt from mustering.
45 Putting Raleigh & Gaston road in repair, company incorporated.
46 Conditions on which they shall have one-half the road, and be exempt from liabilities, &c.

246

47 Mortgage to purchase part of the iron.
48 If terms not accepted, others incorporated.
49 Authorizes State's subscription for connecting with other road.
50 Reserve power of the General Assembly.
51 Appropriations for improving the Neuse and Tar rivers.
52 Junction of roads.
53 Limit for commencement of work three years.

SECTION 1. Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by authority of the same, That for the purpose of effecting a railroad communication between the Wilmington and Raleigh railroad, where the same passes over the Neuse river, in the county of Wayne, and the town of Charlotte in this State, the formation of the corporate company, with the capital stock of three millions of dollars is hereby authorized, to be called "The North Carolina Railroad Company," and when formed in compliance with the conditions hereinafter prescribed, to have a corporate existence as a body politic in perpetuity.

SEC. 2. That the said company be, and the same is hereby authorized to construct a railroad from the Wilmington & Raleigh railroad, where the same passes over Neuse river, in the county of Wayne, via Raleigh, and thence by the most practicable route by Salisbury, in the county of Rowan, to the town of Charlotte, in the county of Mecklenburg.

SEC. 3. That for the purpose of creating the capital stock of said company, the following persons be, and the same are hereby appointed commissioners, viz: Joseph H. Wilson, of Charlotte; William C. Means, of Concord; John B.
247 Lord, of Salisbury; Richard Washington, Waynesboro; John McLeod, of Smithfield; George W. Mordecai, of Raleigh; Henry B. Elliott, Randolph; James M. Leech, Lexington; John M. Morehead, Greensboro; William A. Graham, Hillsboro; Nathan A. Steadman, Pittsboro; Edward B. Dudley, Wilmington; Alonzo P. Jerkins, New Berne; Samuel P. Hargrove, Lexington; Archibald G. Carter, Davie. That it shall be lawful to open books in the town of Wilmington, under the direction of William C. Bettincourt, W. A. Wright, Daniel D. Baker,

Henry T. Nutt, P. K. Dickinson, Gilbert Potter and William Peden. or any three of them; at Charlotte, under the direction of David Parks, John A. Young, James W. Osborne, Joseph H. Wilson, Williams Elms and William F. Davidson, or any three of them; at Raleigh, under the direction of Josiah O. Watson, Duncan K. McRae, William W. Holden, Thomas J. Lemay and Charles L. Hinton, or any three of them; at Gaston, under the direction of Edmund Wilkins, Willis Sledge, Benjamin W. Edwards and James Gresham or any three of them; at Warrenton, under the direction of William Eaton, Daniel Turner, Peter R. Davis, William Plummer and Thomas T. Twitty, or any three of them; at Ridgeway under the direction of George D. Baskerville, Weldon N. Edwards, Michael Collins and Alexander B. Hawkins, or any three of them; at Henderson, under the direction of John S. Eaton, Jno. D. Hawkins, William Uandriers, Demetrius E. Young, or any three of them; at Franklinton, under the direction of Edward T. Fowlkes, William H. Simms, or any three of them; at Hillsborough under the direction of D. F. Long, John Berry, Edward Strudwick and Col. Cadwalader Jones, or any three of them; at Chapel Hill, under the direction of Elisha Mitchell, William H. Merritt, Jesse Hargrave and P. H. McDade, or any three
248 of them; at Asheboro under the direction of Henry B. Elliott, Alexander Hogan, Jesse Harper, Jonathan Worth, or any three of them; at Greensborough, under the direction of John M. Morehead, John A. Gilmer, Wilson S. Hill, John A. Mebane and Jesse Lindsay, or any three of them; at Jamestown, under the direction of Richard Mendenhall, George C. Mendenhall, S. G. Coffin, J. W. Field, or any three of them; at Haywood, under the direction of Robert Faucett, P. Evans and John Williams; at Pittsboro, under the direction of J. A. Stedman, Greene Womack, S. McClenahan, and Joseph Ramsay, or any three of them; at Carthage, under the direction of A. Currie, John M. Morrison, Cornelius Dowd, and J. D. McNeill, or any three of them; at Lexington, under the direction of William R. Holt, James M. Leach, Chas. L. Paine, or any three of them; at Smithfield, under the direction of John McLeod, Bythan Bryan, L. B. Sanders Baldy Sanders, Thaddeus W. Whitley, or any three of them; at Salisbury, under the direction of Archibald H. Caldwell, Charles F. Fisher, Horace L. Robards, Maxwell Chambers, and Thomas L. Cowan, or any three of them; at Statesville under the direction of Theophilus Falls, William F. Cowan, Thomas A. Allison, or any three of them; at Concord, under the direction of Rufus Barringer, Kiah P. Harris, Daniel Coleman, R. W. Foard, and Caleb Phifer, or any three of them; at Mocksville, under the direction of John A. Lillington, Gustavus A. Miller, Archibald G. Carter, and Lemuel Bingham, or any three of them; at Salem, under the direction of Francis Frees, John Vogler, Thomas J. Wilson, John Blackburn or any three of them; whose duty it shall be to direct the opening of books for subscription of stock, at such times
249 and places, and under the direction of such persons as they, or a majority of them may deem proper; and the said commissioners shall have power to appoint a chairman of their body,

treasurer, and all other officers, and to sue for and recover all sums of money that ought, under this act, — be received by them.

SEC. 4. That all persons who may hereafter be authorized to open books for the subscription of stock by the commissioners herein appointed for that purpose, shall open said books at any time after the ratification of this act, twenty days' *previous notice being given* in some one or more of the public newspapers in this State; that said books when opened, shall be kept open for the space of thirty days at least, and as long thereafter as the commissioners above named shall direct; that all subscriptions of stock shall be in shares of one hundred dollars, the subscriber paying at the time of making such subscription five dollars on each share thus subscribed, to the person or persons authorized to receive such subscription; and in case of failure to pay said sum, all such subscriptions shall be void, and of no effect; and upon closing the books, all such sums as shall have been thus received of subscribers on the first cash installment, shall be paid over to the general commissioners, named in the third section of this act, by the persons receiving them; and for failure thereof such person or persons shall be personally liable to said general commissioners before the organization of said company and to the company itself after its organization, to be recovered in the superior court of law within this State, in the county where such delinquent resides, or if he reside in any other State, then in any court
250 in such State having competent jurisdiction: The said general commissioners shall have power to call on and require all persons empowered to receive subscriptions of stock at any time and from time to time, as a majority of them may think proper to make a return of the stock by them respectively received, and to make payment of all sums of money made by the subscribers, that all persons receiving subscriptions of stock shall pass a receipt to the subscriber or subscribers for the payment of the first installment, as heretofore required to be paid; and upon their settlement with the general commissioners, as aforesaid, it shall be the duty of the said general commissioners, in like manner to pass their receipt for all sums thus received, to the persons from whom received; and such receipts shall be taken and held to be good and sufficient vouchers to the persons holding them; that subscriptions of stock — thus received to an amount not exceeding —.

SEC. 5. It shall be the duty of said general commissioners to direct and authorize the keeping open of books for the subscription of stock in the manner above described, until the sum of one million of dollars shall have been subscribed to the capital stock of said company; and as soon as the said sum of one million dollars shall have been subscribed, and the first installment of five dollars per share on said sum shall have been received by the general commissioners, said company shall be regarded as formed, and the said commissioners, or a majority of them, shall sign and seal a duplicate declaration to that effect, with the names of the subscribers appended, and cause one of the said duplicates to be deposited in the office of the secretary of state, and thenceforth from the
251 closing of the books of subscription as aforesaid, the said subscribers to the stock shall form one body politic and cor-

porate, in deed and in law, for the purposes aforesaid, by the name and style of "The North Carolina Railroad Company."

SEC. 6. That whenever the sum of one million dollars shall be subscribed in manner and form aforesaid, the subscribers, their executors, administrators and assigns, shall be, and they are hereby *declared to be incorporated into a company by the name and style* of "The North Carolina Railroad Company;" and by that name shall be capable, in law and in equity, of purchasing, holding, selling, leasing and conveying estates, real, personal and mixed, and acquiring the same by gift, or devise, so far as shall be necessary for the purposes embraced within the scope, object and interest of their charter and no further; and shall have perpetual succession, and by their corporate name may sue and be sued, plead and be impleaded, in any court of law and equity in the State of North Carolina; and may have and use a common seal, which they may alter and renew at pleasure; and shall have and enjoy all other rights and immunities which other corporate bodies may, and of right do exercise; and may make all such by-laws, rules and regulations, as are necessary for the government of the corporation, or affecting the object for which it is created, not inconsistent with the Constitution and laws of the United States and of the State of North Carolina.

SEC. 7. That notice of process upon the principal agents of said company, or the president or any of the directors thereof, shall be deemed and taken to be due and lawful notice of service of
252 process upon the company, so as to bring it before any court within the State of North Carolina.

SEC. 8. That as soon as the sum of one million dollars shall have been subscribed in manner aforesaid, it shall be the duty of the general commissioners, appointed under the third section of this act, to appoint a time for the stockholders to meet at Salisbury, in Rowan county, which they shall cause to be previously published for the space of thirty days, in one or more newspapers, as they may deem proper, at which time and place the said stockholders, in person or proxy, shall proceed to elect the directors of the company, and to enact all such regulations and by-laws as may be necessary for the government of the corporation and the transaction of its business: the persons elected directors of this meeting, shall serve such period, not exceeding one year, as the stockholders may direct; and at this meeting, the stockholders shall fix on the day and place or places where the subsequent election of directors shall be held; and such elections shall henceforth be annually made; but if the day of the annual election should pass without any election of directors, the corporation shall not be thereby dissolved, but it shall be lawful on any other day to hold and make such elections in such manner as may be prescribed by a by-law of the corporation.

SEC. 9. That the affairs of the company shall be managed and directed by a general board, to consist of twelve directors, to be elected by the stockholders from among their number at their first and subsequent general annual meetings, as prescribed in section eighth of this act.

253 SEC. 10. That the election of directors shall be by ballot, each stockholder having as many votes as he has shares in the stock of said company; and the person having a majority of all the votes polled shall be considered as duly elected.

SEC. 11. That the president of the company shall be elected by the directors from among their number, in such manner as the regulations of the company shall prescribe.

SEC. 12. That at the first general meeting of the stockholders, directed to be called under section eighth of this act, a majority of all the shares subscribed shall be represented before proceeding to business, and if a sufficient number do not appear on the day appointed, those who do attend shall have power to adjourn from time to time until a regular meeting shall be thus formed: and at such meeting the stockholders may provide, by a by-law, as to the number of stockholders and the amount of stock to be held by them, which shall constitute a quorum for transacting business at all subsequent regular or occasional meetings of stockholders and directors.

SEC. 13. That — all elections, and upon all votes taken in any general meeting of the stockholders upon any by-laws or any of the affairs of said company, each share of stock shall be entitled to one vote, and that any stockholder in said company may vote by proxy; and proxies may be verified in such manner as the stockholders by by-laws may prescribe.

SEC. 14. That the general commissioners shall make their return of the shares of stock subscribed for, at the first general meeting of stockholders, and pay over to the directors elected at said
254 meeting, or their authorized agent, all sums of money received from subscribers, and for failure therefor, shall be personally liable to said company, to be recovered at the suit of said company, in any of the superior courts of law in this State, within the county where such delinquent or delinquents may reside, and in like manner from said delinquent or said delinquents, executors or administrators, in case of his or their death.

SEC. 15. That the board of directors may fill all vacancies which may occur in it during the period for which they have been elected, and in the absence of the president may fill his place by electing a president *pro tempore* from among their number.

SEC. 16. That all contracts or agreements, authenticated by the president and secretary of the board of directors, shall be binding on the company without a seal, or such a mode of authentication may be used, as the company, by their by-laws, may adopt.

SEC. 17. That the company shall have power and may proceed to construct as speedily as possible, a railroad, with one or more tracks to be used with steam power, which shall extend from the Wilmington & Raleigh railroad, where the same passes over Neuse river, in the county — Wayne, via Raleigh and Salisbury to the town of Charlotte, in Mecklenburg county; said company may use any section of the railroad constructed by them before the whole of said railroad shall have been completed.

SEC. 18. That the said company shall have the exclusive right of

conveyance or transportation of persons, goods, merchandise,
255 and produce over the said railroad, to be by them constructed, at such charges as may be fixed on by a majority of the directors.

SEC. 19. That the said company may, when they see fit, farm out their right of transportation over said railroad, subject to the rules above mentioned; and said company and every person who may have received from them the right of transportation of goods, wares and produce on the said railroad, shall be deemed and taken to be a common carrier, as respects all goods, wares, produce and merchandise entrusted to them for transportation.

SEC. 20. That the board of directors may call for the payment of the sums subscribed as stock in said company in such installments as the interest of said company may, in their opinion, require: the call for each payment shall be published in one or more newspapers in this State for the space of one month before the date of payment; and on failure of any stockholder to pay each installment as thus required, the directors may sell at public auction on a previous notice of ten days for cash, all the stock subscribed for in said company, by such stockholders, and convey the same to the purchaser at said sale; and if said sale of stock do not produce a sum sufficient to pay off the incidental expenses of the sale, and the entire amount owing by such stockholders to the company, for such subscription of stock, then and in that case the whole of such balance shall be held and taken as due at once to the company, and may be recovered of such stockholder or his executors, administrators or assigns, at the suit of said company, either by summary motion in any court of superior jurisdiction in the county where the de-
256 linquent resides, on a previous notice of ten days to said subscriber, or by the action of assum-sit in any court of competent jurisdiction, or by a warrant before a justice of the peace, where the sum does not exceed one hundred dollars; and in all cases of assignment of stock, before the whole amount has been paid to the company, then for all sums due on such stock, both the original subscribers, and the first and all subsequent assignees shall be liable to the company, and the same may be recovered as above described.

SEC. 21. That the debt of stockholders, due to the company for stock therein, either as original proprietor or as first or subsequent assignee, shall be considered as of equal dignity with judgments in the distribution of assets of a deceased stockholder, by his legal representatives.

SEC. 22. That said company shall issue certificates of stock to its members; and said stock may be transferred in such manner and form as may be directed by the by-laws of the company.

SEC. 23. That the said company may, at any time, increase its capital to a sum sufficient to complete said road, not exceeding — dollars, either by opening books for new stock or by selling such new stock or by borrowing money on credit of the company, and on the mortgage of its charter and works; and the manner in which

the same shall be done in either case, shall be prescribed by the stockholders at a general meeting.

SEC. 24. That the board of directors shall once in every year at least, make a full report on the state of the company, and its affairs to a general meeting of the stockholders, and oftener if required by a by-law, and shall have power to call a general meeting of
257 the stockholders, when the board may deem it expedient; and the company may provide, in their by-laws, for occasional meetings being called, and prescribe the mode thereof.

SEC. 25. That the said company may purchase, have and hold, in fee, or for a term of years, any land, tenements, or hereditaments, which may be necessary for the said road, or the appurtenances thereof, or for the erection of depositories, storehouses, houses for the officers, servants or agents of the company, or for workshops or foundaries, to be used for the said company; or for procuring stone or the materials necessary to the construction of the road, or for effecting transportation thereon, and for no other purpose whatever.

SEC. 26. That the company shall have the right when necessary to conduct the said road across or along any public road or water-course: Provided, that the said company shall not obstruct any public road, without constructing another equally as good, and as convenient, nor without making a draw to any bridge to said road, which may cross a navigable stream, sufficient for the passage of vessels navigating such stream, which draw shall be opened by the company for the free passage of vessels, navigating such stream.

SEC. 27. That when any lands or right of way may be required by said company, for the purpose of constructing their road, and for the want of agreement as to the value thereof, or from any other cause, the same cannot be purchased from the owner or owners, the same may be taken at a valuation to be made by five commis-
258 sioners, or a majority of them, to be appointed by any court of record, having common-law jurisdiction in the county where some part of the land or right of way is situated. In making the said valuation, the said commissioners shall take into consideration the loss or damages which may accrue to the owner or owners in consequence of the land or the right of way being surrendered, and the benefit and advantage he, she or they may — received from the erection or establishment of the railroad or work, and shall state particularly the value and amount of each; and the excess of loss and damage, over and above the advantage and benefit, shall form the measure of valuation of the said land or right of way: Provided, nevertheless, that if any person or persons over whose land the road may pass, should be dissatisfied with the valuation of said commissioners, then and in that case, the person or persons so dissatisfied may have an appeal to the superior court, in the county where the said valuation has been made, or in either county in which the land lies, when it may lie in one — more than one county, under the same rules, regulations and restrictions as in appeals from judgments of justices of the peace. The proceedings of the said commissioners, accompanied with the full description of the said land or right of way, shall be returned, under the hands and seals of a majority

of the commissioners, to the court from which the commission issued, there to remain a matter of record. And the lands or right of way so valued by the said commissioners, shall vest in the said company so long as the same shall be used for the purposes of said railroad, so soon as the valuation may be paid, or, when refused, may have been tendered: Provided, that on application for the appointment of commissioners, under this section, it shall be made to appear to the satisfaction of the court, that at least ten days' previous notice has been given by the applicant to the owner or owners of land so proposed to be condemned, or, if the owner or owners be infants, or *non compos mentis*, then to the guardian of such owner or owners, if such guardian can be found within the county, or if he cannot be so found, then such appointment shall not be made unless notice of the application shall have been published, at least one month next preceding, in some newspaper printed as convenient as may be to the court-house of the county, and shall have been posted at the door of the court-house, on the first day at least of the term of said court, to which the application is made: Provided further, that the valuation provided for in this section, shall be made on oath by the commissioners aforesaid, which oath, any justice of the peace, or clerk of the court of county in which the land or part of it lies, is hereby authorized to administer: Provided further, that the right of condemnation herein granted shall not authorize the said company to invade the dwelling-house, yard, garden or burial ground of any individual, without his consent.

SEC. 28. That the right of said company to condemn lands in the manner prescribed in the 27th section of this act, shall extend to the condemning one hundred feet on each side of the main track of the road, measuring from the center of the same, unless in case of deep cuts and fillings, when said company shall have power to condemn as much in addition thereto, as may be necessary for the purpose of constructing said road; and the company shall also have power to condemn any appropriate lands in like manner, for the constructing and building of depots, shops, warehouses, buildings for servants, agents and persons employed on the road, not exceeding two acres in any one lot or station.

SEC. 29. That in the absence of any contract or contracts with said company, in relation to lands through which said road or its branches may pass, signed by the owner thereof or by his agent, or any claimant or person in possession thereof which may be confirmed by the owner thereof, it shall be presumed that the land upon which the said road or any of its branches may be constructed, together with a space of one hundred feet on each side of the center of the said road has been granted to the said company, by the owner or owners thereof; and the said company shall have good right and title thereto, and shall have, hold, and enjoy the same as long as the same be used for the purposes of said road and no longer, unless the person or persons owning the said land at the time that part of the said road which may be on the said land, was finished, or those claiming under him, her or them, shall apply for an assessment of

the value of said lands, as hereinbefore directed, within two years next after that part of said road, which may be on the said land, was finished; and in case the said owner or owners, or those claiming under him, her or them, shall not apply within two years next after the said part was finished, he, she or they shall be forever barred from recovering said land or having any assessment or compensation thereof: Provided, nothing therein contained shall effect the rights of feme coverts or infants, until two years after the removal of their respective disabilities.

SEC. 30. That all lands not heretofore granted to any person, nor appropriated by law to the use of the State, within one hun-
261 dred feet of the center of said road, which may be constructed by the said company, shall vest in the company as soon as the line of the road is definitely laid out through it, and any grant of said land thereafter shall be void.

SEC. 31. That if any person or persons shall intrude upon the said railroad by any manner of use thereof, or the rights and privileges connected therewith, without the permission or contrary to the will of the said company, he, she or they may be indicted for misdemeanor, and upon conviction, fined and imprisoned by any court of competent jurisdiction.

SEC. 32. That if any person shall wilfully and maliciously destroy, or in any manner hurt, or damage, or obstruct, or shall wilfully and maliciously cause, or aid, or assist or counsel and advise any other person or persons to destroy or in any manner to hurt, damage or destroy, injure or obstruct the said railroad, or any bridge or vehicle used for or in the transportation thereon, any water tank, warehouse, or any other property of said company, such person or persons so offending, shall be liable to be indicted therefor, and on conviction, shall be imprisoned not more than six, nor less than one month, and pay a fine not exceeding five hundred dollars, nor less than twenty dollars, at the discretion of the court before which said conviction shall take place; and shall be further liable to pay all expenses of repairing the same; and it shall not be competent for any persons so offending against the provisions of this clause to defend himself by pleading or giving in evidence that he was the owner agent, or servant of the owner of the land where such destruction, hurt, damage, injury, or obstruction was done, at the time the same was done or caused to be done.

262 SEC. 33. That every obstruction to the safe and free passage of vehicles on the said road or its branches shall be deemed a public nuisance, and may be abated as such by any officer, agent or servant of said company, and the person causing such obstruction may be indicted and punished for erecting a public nuisance.

SEC. 34. That the said company shall have the right to take at the storehouses they may establish on, or annex to their railroad or the branches thereof, all goods, wares, merchandise and produce intended for transportation, prescribe the rules of priority and charge and receive such just and reasonable compensation for storage, as they may by rules establish (which they shall cause to be published) or as may be fixed by agreement with the owner which may be dis-

inct from the rates of transportation; provided, that the said company shall not charge or receive storage on goods, wares, merchandise or produce which may be delivered to them at their regular depositories for immediate transportation, and which the company may have power to transport immediately.

SEC. 35. That the profits of the company, or so much thereof as the general board may deem advisable, shall, when the affairs of the company will permit, be semi-annually divided among the stockholders, in proportion to the stock each may own.

SEC. 36. That whenever it shall appear to the board of internal improvements of this State, by a certificate under the seal of said company, signed by their treasurer and countersigned by their president, that one-third have been subscribed for and taken, and that at least five hundred thousand dollars of said stock has been actually paid into the hands of said treasurer of said company,
263 the said board of internal improvements shall be, and they are hereby authorized and required to subscribe on behalf of the State, for stock in said company, to the amount of two millions of dollars to the capital stock of said company; and the subscriptions shall be paid in the following manner; to wit: the one-fourth part as soon as the said company shall commence work, and one-fourth thereof every six months thereafter, until the whole subscription in behalf of the State shall be paid; provided, the treasurer and president of said company shall, before they receive the aforesaid installments, satisfactorily assure the board of internal improvements, by the certificates, under the seal of said company, that an amount of the private subscriptions has been paid in equal proportion to the stock subscribed by the State.

SEC. 37. That if in case the present legislature shall not provide the necessary and ample means to pay the aforesaid installments on the stock subscribed for on behalf of the State, as provided for in the thirty-sixth section of this act, and in that event, the board of internal improvements aforesaid, shall, and they are hereby authorized and empowered to borrow, on the credit of the State, not exceeding two millions of dollars, as the same may be needed by the requirements of this act.

SEC. 38. That if in case it shall become necessary to borrow the money, by this act authorized, the public treasurer shall issue the necessary certificates, signed by himself and countersigned by the comptroller, in sums not less than one thousand dollars each, pledging the State for the payment of the sums therein mentioned, with interest thereon at the rate of interest not exceeding six per
264 cent. per annum, payable semi-annually, at such times and places as the treasurer may appoint—the principal of which certificates shall be redeemable at the end of thirty years from the time same are issued; but no greater amount of such certificates shall be issued at any one time than may be sufficient to meet the installments required to be paid by the State at that time.

SEC. 39. Be it further enacted, That the comptroller shall register the said certificates at large in a book to be by him kept for that purpose, at the time he countersigns the same; and when he de-

livers the same to the public treasurer, he shall charge him in his books with the amount thereof, and also with all such sums, if any, as the public treasurer may obtain by way of premium on the sale of the said certificates, an account of which the public treasurer shall render to the comptroller, so soon as negotiations from time to time, for the sale of said certificates, are closed.

SEC. 40. Be it further enacted, That if it shall become necessary to issue the certificates aforesaid, the public treasurer, shall advertise in one or more newspapers, as he may think best, and invite sealed proposals for such amount of the aforesaid sum of two millions of dollars as may be wanted at any one time, and it shall be his duty to accept those terms which may be most advantageous to the State; provided, that in no event shall any of the said certificates be sold for less than their par value; and any premium which may be obtained on the sale of said certificates shall be placed in the public treasury, and used as other public funds in the payment of interest on the debt hereby created.

SEC. 41. Be it further enacted, That as security for the
265 redemption of said certificates of debt, the public faith of the State of North Carolina is hereby pledged to the holders thereof, and in addition thereto all the stock held by the State in "the North Carolina Railroad Company," hereby created, shall be, and the same is hereby, pledged for that purpose; and any dividends of profit which may, from time to time, be declared on the stock held by the State as aforesaid shall be applied to the payment of the interest accruing on said certificates; but until such dividends of profit may be declared, it shall be the duty of the treasurer, and he is hereby authorized and directed to pay all such interest as the same may accrue out of any moneys in the treasury not otherwise appropriated.

SEC. 42. Be it further enacted, That the certificates of debt hereby authorized to be issued, shall be transferrable by the holders thereof, their agents or attorneys, properly constituted, in a book to be kept by the public treasurer for that purpose; and in every instance, where a transfer is made, the outstanding certificate shall be surrendered and given up to the public treasurer, and by him canceled and a new one, for the same amount, issued in its place to the person to whom the same is transferred.

SEC. 43. That the State shall appoint the number of directors in said company, in proportion to the stock subscribed, who shall be appointed by the governor, by and with the advice and consent of his counsel, and removed in like manner.

SEC. 44. That the following officers and servants and persons in
the actual employment of the said company be, and they are
266 hereby exempted from the performance of jury and ordinary *malitia* duty: The president and treasurer of the board of directors, and chief and assistant engineers, the secretaries and accountants of the company, keepers of the depositories, guards stationed on the road to protect it from injury, and such persons as may be working the locomotive engines and traveling with cars for

the purpose of attending to the transporting of produce, goods and passengers on the road.

SEC. 45. Be it enacted That for the purpose of putting the Raleigh & Gaston railroad in good and complete order for the profitable transportation of persons and produce, and for the further purpose of reviving the late Raleigh & Gaston Railroad Company, Rhodes N. Herndon, Thomas Miller, Jno. S. Eaton of Granville county; Wm. J. Hawkins, Welden N. Edwards, George D. Baskerville of Warren county; George W. Mordecai, Richard Smith, W. W. Holden of Wake county, Jno. D. Hawkins Sr., Allen C. Perry, Jno. D. Hawkins Jr., of Franklin county; and the late stockholders and obligors for the Raleigh & Gaston Railroad Company, or any part of them, and such other persons and corporations as may associate with them are hereby created a body politic and corporate, by the name and style of the Raleigh & Gaston Railroad Company, and by that name shall be able to sue and be sued, and shall have, possess and enjoy all the rights, franchises, powers and privileges, vested in and granted to the Raleigh & Gaston Railroad Company, by an act, entitled "An act to incorporate the Raleigh & Gaston Railroad Company," passed by the General Assembly of this State on the — day of ——, and shall be subject to all the restraints, limitations, restrictions and liabilities imposed by the said act; and all the other
267 provisions of the said act, so far as the same remain to be executed, are hereby declared to be in full force and effect, upon the following terms and conditions nevertheless.

SEC. 46. Be it enacted, That whenever the said persons and their associates named in the foregoing section shall have subscribed the sum of five hundred thousand dollars, for the purpose aforesaid, and shall have expended the same, in putting the Raleigh & Gaston railroad in full and complete order, with heavy T-rail iron, or other iron equally good, not weighing less than fifty pounds to the yard, then one-half of the said railroad, with all the machine shops, depots, water stations, engines, coaches, cars, and every other property appertaining to the said railroad, shall be sold, conveyed and transferred to the said subscribers, their heirs and assigns by the governor, under the great seal of the State; and the said late stockholders and obligors of the said Raleigh & Gaston railroad, shall be and are hereby declared to be forever released and discharged from all liability to the State, for and on account of the *the* said Raleigh & Gaston Railroad Company, upon the payment of costs incurred. And the governor is hereby authorized, and it is declared to be his duty to suspend the further prosecution of suits brought by the State, against the said stockholders and obligors, until it can be ascertained whether the said subscribers are willing to accept the conditions of this act, and that they shall be allowed two years from the passage of this act to make known their determination to the governor. And if the terms and conditions of this act shall be accepted, and the work commenced within two years, and finished within three years from the ratification of this act, then this act shall continue and be
268 in full force for ninety years and no longer.

SEC. 47. Be it further enacted, That if the conditions of this

act are accepted, and the sum of five hundred thousand dollars shall have been subscribed by solvent subscribers to be judged of by the governor and attorney general, then and in that case, the said subscribers shall have lawful authority to mortgage one-half of the said railroad, to enable them to obtain the necessary credit to purchase a part of the iron which will be needed for said road.

SEC. 48. Be it further enacted, That is the said subscribers shall refuse or neglect to accept the terms and conditions of this act, then all the benefits of the same shall be granted to Thomas F. Wyatt, John Campbell, Thomas P. Devereux, Andrew Joyner, Weldon N. Edwards, George D. Baskerville and Alexander Hawkins and such other persons as may associate with them, who shall accept and comply with all the terms and conditions of the same; and they and their successors are hereby incorporated into a company by the name and style of the Raleigh & Gaston Railroad Company, and by that name shall have lawful authority to sue and be sued, to hold, possess and enjoy all the rights, franchises, powers and privileges granted by this act and shall be subject to all the restraints, limitations, restrictions and liabilities imposed by the same.

SEC. 49. Be it enacted, That whenever the Roanoke Railroad Company, or the Seaboard & Roanoke Railroad Company with or without the aid of individuals, shall subscribe to the Raleigh and Gaston Railroad Company, one-half of the sum necessary to construct a railroad from some convenient point on the Raleigh
269 & Gaston railroad, near the Littleton depot, or any point between that depot and Roanoke river, and the town of Weldon, or any point in the neighborhood thereof, so as to connect with the Wilmington & Raleigh railroad, and the Seaboard & Roanoke railroad, and shall expend the said sum in forming the said connection, then the said Raleigh & Gaston railroad shall be extended to the said town of Weldon or in neighborhood thereof; and the public treasurer is hereby authorized and directed to subscribe for an equal sum for and in behalf of the State, and pay for such subscription, out of any money in the treasury not otherwise appropriated; and for want of such money in the treasury, the public treasurer is hereby authorized to borrow the sum at a rate of interest not exceeding six per cent. per annum, and to issue bonds payable at any time within ten years, for not less than five hundred dollars each.

SEC. 50. And be it further enacted, That one of the conditions of this charter is that this General Assembly shall have power and authority at any future session to establish regulate and control the intercourse between the North Carolina railroad and the Raleigh and Gaston railroad, so as best to secure to the public, an easy and convenient passage of persons and property.

SEC. 51. Be it further enacted, That the sum of forty thousand dollars, to be raised by the State in the same manner as other moneys are raised by the provisions of this act, be and the same is hereby appropriated for the purpose of cleaning out and improving the navigation of the River Neuse, between the town of Newbern and the town of Smithfield. And also, that the further sum of twenty-

five thousand dollars to be raised in like manner, be and the
270 same is hereby appropriated, for the purpose of clearing out and improving the navigation of the Tar river between the town of Washington and the falls of the said river; and that his excellency the governor is hereby empowered and required to appoint suitable commissioners to carry into effect the requirements of this section: Provided, the sum hereby appropriated to the Neuse and Tar rivers shall not be paid by the public treasurer, until the railroad company shall have subscribed the whole amount of stock required from them, by the provisions of this act, and have commenced operations on said road.

SEC. 52. Be it further enacted That as soon as the said North Carolina railroad is commenced and the superstructure of the same laid down at Raleigh, the owners proprietors and authorities of the Raleigh and Gaston railroad shall be, and they are hereby authorized and empowered to effect a junction and form a- actual connection with the said North Carolina railroad, at such point at or in the vicinity of Raleigh as they at their discretion may select.

SEC. 53. Be it further enacted, That all the works hereby required of the North Carolina Railroad Company shall be executed with due diligence, and if they be not commenced within three years after the ratification of this act, and finished within ten years after the period of commencement, then this charter shall be forfeited.

(Ratified 27th day of January, 1849.)

271 EXHIBIT F.

LAWS OF 1854–'55, CHAPTER 32.

An act for the completion of the North Carolina railroad.

SEC. 1. Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same, That the public treasurer is authorized and instructed, to subscribe in behalf of the State, for ten thousand additional shares of the capital stock in the North Carolina Railroad Company, and that he make payments for said stock, by issuing and making sale of the bonds of the State, under the same provisions, regulations and restrictions, prescribed for the sale of the bonds heretofore issued and sold to pay the State's original subscription in the stock of said company; and the same pledges and securities are hereby given for the faithful payment and redemption of the certificates of debt now authorized, that were given for those issued under the direction of said act: Provided, nevertheless, that the whole amount of principal money of such bonds or certificates of debt, shall not exceed the sum of one million of dollars.

SEC. 2. Be it further enacted, That the stock thus directed to be subscribed and paid for in behalf of the State, shall be a preferred stock in the North Carolina Railroad Company, and the stock shall be entitled to six per cent. per annum, payable semi-annually thereon, out of any dividends of profits made by said company,

before any dividends shall be paid on any other stock in the same; and that the stockholders of said company, in general meeting
272 assembled, shall give their assent to the provisions of this act; and that the president of said company shall make a certificate of said assent, under the seal of the said company, to be approved by the governor of the State, and filed in the office of the public treasurer, before the subscription shall be made as directed in the first section of this act: Provided, that said stock of one million shall continue to be preferred stock, entitled as aforesaid, only so long as, and during the time that it is held by the State; but upon being sold and transferred by the State, shall thenceforth cease to be entitled to dividends of preference as aforesaid: Provided further, that said stock may be transferred to any other work of internal improvements, by a future legislature.

SEC. 3. Be it further enacted, That the affairs of the said company shall be managed and directed by a general board to consist of twelve directors, eight on the part of the State and four on the part of the individual stockholders, to be elected and appointed as heretofore provided in the original act or incorporation of said company, at the general annual meetings of stockholders of said company; and that no person shall be competent to act as a director in said company, who is not a stockholder to the amount of five shares of stock.

SEC. 4. Be it further enacted, That at all general meetings of the stockholders, the State shall be represented by an agent or proxy appointed by the governor, and such agent or proxy shall not be entitled, in the general meetings aforesaid, to vote in the election of directors to be elected on the part of individuals.

SEC. 5. Be it further enacted, That all real estate held by said company for right of way, for station places, of whatever
273 kind, and for workshop location, shall be exempt from taxation, until the dividends of profits of said company shall exceed six per centum per annum.

SEC. 6. Be it further enacted, That the sum of fifteen thousand dollars to be raised by the State, in the same manner as other moneys are raised by the provisions of this act, be and the same is hereby appropriated for the purpose of cleaning out and improving the navigation of Tar river, between the town of Washington and the fall of said river; and that his excellency the governor is hereby empowered and required to appoint suitable commissioners, to carry into effect the requirements of this section.

SEC. 7. Be it further enacted, That this act shall take effect and be in force from its ratification.

(Ratified the 14th day of February, 1855.)

274 EXHIBIT G.

Petition Addressed to the General Assembly of North Carolina by Certain Holders of North Carolina Bonds Issued in Aid of the W. N. C. R. R.

To the honorable the senate and house of representatives of the General Assembly of North Carolina:

Your petitioners, S. M. Schafer and S. Schafer, who are citizens and residents of the State of New York, beg leave to respectfully present to you the following petition, for such action as your honorable body may deem just and reasonable in the premises.

1. Your petitioners are the owners and holders and are now in the actual possession of two hundred and thirty-four bonds, each for the sum of one thousand dollars, which were issued by the State of North Carolina for the benefit of the Western North Carolina railroad, and which are due and payable thirty years after their respective dates. A majority of these bonds are owned by your petitioners in their own right, and the remainder are held and owned by them as trustee for others, and to each of said bonds there are attached semi-annual coupons, as are set forth in the schedule, marked Exhibit "A," hereto appended. The schedule shows the number and the date of the bonds, the date of their maturity and the number of coupons respectively attached hereto, and a copy of one of the bonds and coupons *are* also annexed.

2. Your petitioners aver that all of said bonds and cou-
275 pons are identical in form with the copies attached, except as to date and number, as appears in the exhibit.

3. Your petitioners, and those for whom they are trustees, are purchasers for value of the said bonds, relying upon the plighted faith and credit of the State of North Carolina, and upon the pledge indorsed thereon, as hereinafter set forth, and without notice at the time of their purchase, or at any time since, of any objection to the validity of the bonds or of the pledges indorsed thereon.

4. That the said bonds were issued under and by virtue of chapter 228, Acts 1854–'55, entitled "An act to incorporate the Western North Carolina Railroad Company," ratified the 15th day of February, 1855, and an act amendatory thereof, to wit, chapter 106 of the Laws of 1866–'67, ratified the 19th day of December, 1866, entitled "An act to enhance the value of the bonds to be issued for the completion of the Western North Carolina railroad and for other purposes," which act is as follows:

"An act to enhance the value of the bonds to be issued for the completion of the Western North Carolina railroad, and for other purposes.

"Whereas the legislature of North Carolina, at its session of 1854–'55, passed an act, entitled 'An act to incorporate the Western North Carolina Railroad Company' and at its session of 1860–'61,

an act, entitled 'An act to amend the charter of the Western North Carolina Railroad Company;' and,

"Whereas, by the combined force of said acts, the faith of the State of North Carolina was pledged for the payment of four millions of dollars in bonds of the State, a portion of which have already been issued; and,

276 "Whereas, it is manifestly the interest of the people of the whole State that the residue of the bonds, when issued, shall command a high price in the market; therefore,

"SECTION 1. Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by authority of the same, That the public treasurer be and he is hereby authorized and directed, whenever it shall become his duty under the provisions of said acts, passed at the sessions of 1854–'55 and 1860–'61, to issue bonds of the State to the amount of fifty thousand dollars, or more, to mortgage an equal amount of the stock which the State now holds in the North Carolina railroad, as collateral security for the payment of said bonds, and to execute and deliver, with each several bond a deed of mortgage for an equal amount of stock *to* (of) said North Carolina railroad, said mortgage to be signed by the treasurer and countersigned by the comptroller, to constitute a part of said bond, and to be transferable in like manner with it, as provided in the charter of said Western North Carolina Railroad Company; and further, that such mortgage shall have all the force and effect, in law and equity, of registered mortgages without actual registry.

"SEC. 2. Be it further enacted, That the president and directors of said Western North Carolina Railroad Company be and they are hereby, authorized and empowered to issue bonds of the company, running for such term of years as they may deem expedient, and bearing interest at a rate not greater than 8 per cent. per annum, and to make, execute and deliver a deed or deeds of mortgage, conveying the whole or a portion of the right, title and interest of the company, in any or all the estate, both real and personal,

277 belonging to said company, or in any manner pertaining to the same, to the purchaser or purchasers of said bonds of the company, and conditioned for securing the payment of said bonds at maturity; and also to pledge the profits of said company, or so much thereof as may be necessary, for the payment of the interest on said bonds, as it falls due; and said bonds shall be issued by said president and directors, whenever it shall appear to them necessary, for the completion of said road, to raise other funds in addition to the State's subscription; and the proceeds arising from the sale of said bonds shall be applied for the purpose of finishing the road to its western termini.

"SEC. 3. Be it further enacted, That this act shall be in force from and after its ratification.

"Ratified the 18th day of December, A. D. 1866."

5. That under and by virtue of section 1 of the said act of 1866–'67, chapter 106, the State treasurer was directed to mortgage "an equal

amount of the stock which the State now holds in the North Carolina railroad as collateral security for the payment of said bonds, and to execute and deliver with each several bond a deed of mortgage for an equal amount *to* (of) stock of said North Carolina railroad, said mortgage to be signed by the treasurer and countersigned by the comptroller to constitute a part of said bond and to be transferable in like manner with it, as provided in the charter of said Western North Carolina Railroad Company; and, further, that said mortgage shall have the force and effect, in law and equity, of registered mortgages without actual registry."

6. That at the time of the passage of said act the State was
278 the owner of 30,000 shares of stock in the North Carolina Railroad Company of the par value of three million dollars; and that the mortgage, which under the act of December 19, 1866, the treasurer of the State was required to execute, was executed in the manner following—that is to say, the State, through its treasurer and with the approval of the governor, caused to be indorsed upon each of the said bonds issued under said act of December 19, 1866, the following indorsement:

"STATE OF NORTH CAROLINA,
"TREASURY DEPARTMENT, RALEIGH, *July* 1, 1867.

"Under the provisions of an act of the General Assembly of North Carolina, entitled 'An act to enhance the value of the bonds to be issued for the completion of the Western North Carolina Railroad Company, and for other purposes,' ratified 19th December, 1866, ten shares of the stock in the North Carolina Railroad Company, originally subscribed for by the State, are hereby mortgaged as collateral security for the payment of this bond.

"Witness the signature of the public treasurer and seal of office, and the counter-signature of the comptroller.

"KEMP P. BATTLE,
"*Public Treasurer.*

"S. W. BURGIN, *Comptroller.*"

7. That under and by virtue of the terms of the act of December 19, 1866, above set forth, and the contract thereby created between the purchasers of the said bonds and the State of North Carolina, and under and by virtue of the indorsement aforesaid, the
279 State is bound to your petitioner- to make good its contract of mortgage upon the ten shares of stock of the North Carolina Railroad Company out of the thirty thousand shares owned by the said State of North Carolina for the security of each of the bonds issued under the said act and held by the plaintiffs.

8. Your petitioners further represent that prior to the passage of the act of 1866–'67, chapter 106, under the terms of the thirty-sixth section of the act to incorporate the North Carolina Railroad Company, Acts 1848–'49, chapter 82, it was provided that the State should make a subscription of two millions of dollars to the capital stock of the North Carolina Railroad Company, and under and by virtue of the Laws of 1854–'55, chapter 32, section 1, amending

the act just above recited, the amount of the State's subscription was increased to three million of dollars; and under and by virtue of the provisions of both acts it was provided that, as security for the three million of bonds or certificates of debt, therein authorized to be issued, all the stock held by the State in the North Carolina Railroad Company was pledged as security for the said three million of bonds, known as North Carolina Railroad construction bonds, herein termed "said construction bonds."

9. That your petitioners are advised and believe that the effect of these statutes, taken in connection with the statute authorizing the pledge of the ten shares of North Carolina Railroad stock for the security of each bond issue, under the act of December 19, 1866, was to give the North Carolina construction bondholders a first mortgage, or lien or pledge, on all the State's stock in the said North Carolina Railroad Company, and to give to the holders of the
280 bonds issued in aid of the Western North Carolina railroad, under the act of December 19, 1866, a second mortgage or equitable lien upon the said stock, to the extent of ten shares for each of the bonds so issued.

10. Your petitioners further represent that the owners of the said construction bonds filed a bill in equity in the circuit court of the United States for the district of North Carolina against D. A. Jenkins, then State treasurer, the North Carolina Railroad Company and others, to enforce their lien upon, the said stock, and that there was never a final decree entered in the said suit adjudging the rights of the parties; but that pending the litigation there was an adjustment or compromise entered into between the parties to said action, as directed under the provisions of "An act to adjust and renew a portion of the State's debt," Acts 1879, chapter 138, and the said act is made a part of this petition as if fully and at large set forth.

11. That under said act commissioners were appointed who negotiated with the holders of the North Carolina Railroad construction bonds, and agreed upon a settlement and compromise with the said bondholders, as by said act authorized and directed; and that, by the terms of the said compromise, the public treasurer was directed to issue bonds of the State, dated April 1, 1879, payable forty years after date, bearing interest at the rate of 6 per cent. That by section 8 of the said act it was provided that these bonds should in all respects stand in the place of and be entitled to the same securities as were the bonds previously issued under the acts of 1848–'49 and 1854'–55, above recited, and it was provided that
the bonds should have the same lien upon the stock of
281 the State in the North Carolina Railroad Company as the bonds originally issued under said acts.

12. Your petitioners aver that the terms of the compromise, entered — under the provisions of this act between the commissioners and the bondholders, are set forth by the said commissioners in a statement, a copy of which is hereto appended, marked Exhibit "C," and prayed to be taken as a part hereof; but your petitioners aver that neither they, nor any other holder of the Western North Caro-

lina Railroad bonds, mentioned herein, were parties to, or consented to, this extension of the lien of the said construction bonds, and that such extension, so far as they are concerned, is illegal and void, in that it extends the lien of a first mortgage without the consent of the holders of the second-mortgage bonds, or those entitled to the protection of the second mortgage.

13. Your petitioners further aver that such extension of the first-mortgage bonds, so far as the rights of your petitioners are concerned, is utterly without warrant of law. Your petitioners were, at the time the first-mortgage bonds matured, entitled to pay off the total amount due on the said bonds upon the faith of the North Carolina Railroad stock pledged as collateral, and to surrender and cancel their own second-mortgage bonds upon reasonable terms, and this can now be done at any time; and that such a transaction would leave a large surplus in money or in North Carolina Railroad stock the property of the State, free and discharged from all liens. Your petitioners allege that they would consent to any course whereby their interests and the interests of the State would be mutually protected. The new extended bonds (those illegally issued in disregard of the rights of your petitioners and
282 all others holding the second-mortgage bonds) bear 6 per cent. interest and have still nineteen years to run; whereas, your petitioners aver that a bond issued by the State, bearing interest at a less rate than 4 per cent.—for example, at the rate of .0365, or three and a half per cent., without any collateral or security save that of the faith and credit of the State—will sell for par in the markets of the world. Your petitioners further aver that but for the rule that the State of North Carolina cannot be sued, their right to a relief in the courts would be clear and unmistakable, and that the relief to which they are entitled could be obtained in the courts; as under the construction of the law made in the circuit court of the United States such relief was administered to the holders of the first-mortgage construction bonds, above mentioned, severally known as the "Swazey bonds." Your petitioners frankly admit that, under later decisions of the Supreme Court of the United States they are not confident that their rights can be administered in the Federal courts, so far as any claim involving the stock held by the State of North Carolina is concerned. But your petitioners aver that, as upon the one hand, they are in honor and in justice entitled to have their rights adjudicated, so, upon the other, the adjudication of such rights would result in great advantage to the State. The equitable right of your petitioners to have their second mortgage passed upon, and their right to a condemnation of the property pledged to the payment of the amount due upon the bonds of your petitioners after the payment of the principal of the first mortgage (the interest having been paid continuously since the adjustment) properly adjudicated, is beyond question. Certainly the holder
283 of the Swazey bonds could not object. Any course that the State might take, if the right of your petitioners to have the State's stock in the North Carolina Railroad Company sold should

be affirmed, would result in large profit to the State, and that without any bad faith upon its part; because the second-mortgage bondholders have always been entitled in law and equity to have the first mortgage paid off upon its maturity. By the sale of about twenty thousand shares of the thirty thousand owned by the State, at the prevailing prices of the stock, of the North Carolina railroad, the total issue of first-mortgage bonds could be paid off, and a sufficient additional sum realized out of which the State could pay or adjust the second-mortgage bonds owned by your petitioners. This would leave the State in possession of ten thousand (10,000) shares of stock of the North Carolina railroad free from any lien and realizing at least seventy thousand dollars to the State each year, and besides, give the State the satisfaction of having paid off the outstanding bonds of your petitioners, for which it is now offering about sixty thousand dollars in North Carolina 4 per cent. bonds. But if the State shall regard it as best to its interest to retain the thirty thousand shares of stock in the North Carolina railroad, as your petitioners believe will be to its interest to do, then it can purchase the stock at the sale, to which your petitioners would be and are in law and justice entitled in any court, at any price to which it might be bid up, since the surplus above the amount of the bonds outstanding would belong to the State; and by a sale of about three million two hundred thousand dollars of three and a half per
284 cent. bonds ($3,200,000), pay off and discharge all the bonds secured by the pledge of stock, first and second mortgages. Thus, by paying an interest charge of about one hundred and twelve thousand dollars, it would receive an annual income of two hundred and ten thousand dollars, an annual excess upon its stock of about one hundred thousand dollars a year. Or if the State shall decline to become a party to any litigation, then it surely should be willing to issue bonds to the amount of the value of the stock actually pledged (ten shares to each bond) to the security of the bonds. The State's stock is three millions, worth four million eight hundred thousand. The par value of the outstanding State bonds is two million seven hundred and twenty thousand dollars. The railroad stock at par is ample security for the bonds, and the State owns two thousand eight hundred shares, practically free from lien. Of this, two thousand four hundred and twenty shares are pledged to the security of petitioners' bonds, or two thousand five hundred shares to all outstanding bonds of this class.

The State surely should issue State bonds to the amount of the value of this stock, four hundred thousand dollars, to discharge the lien of the second mortgage. Your petitioners are willing to meet the State in a frank and liberal spirit to adjust their claims.

14. Your petitioners further show that since the so-called extension of the construction bonds by the agreement of 1880, the dividends on the State stock have annually amounted to one hundred and eighty thousand dollars ($180,000), while the annual interest on the construction bonds has amounted only to the sum of one hundred

and sixty-three thousand and two hundred dollars ($163,200),
285 thus leaving an excess of sixteen thousand and eight hundred dollars ($16,800) per annum for the period of twenty years, making a total of three hundred and thirty-six thousand dollars ($336,000), which amount has been covered into the general fund of the State treasury, and has been used for the ordinary expenses of the State, notwithstanding the rights of the petitioners under the second mortgage to have the same applied to the payment of the interest on their bonds, amounting to fourteen thousand and forty dollars ($14,040) per annum.

15. That your petitioners are informed and believe and, upon such information and belief, allege, that all of the bonds issued under the act of 1854–'55, as amended by the act of 1866–'67, save and except the two hundred and thirty-four bonds held by petitioners and a few others, have been surrendered to the State and cancelled, and there now remains only about two hundred and fifty thousand dollars, principal of said bonds, and the interest due thereon.

16. That your petitioners are informed and believe, and so allege, that there were issued under the act of 1866, bonds of the State amounting to about sixteen hundred thousand dollars ($1,600,000), principal, and calling for the collateral in the stock of the North Carolina Railroad Company; that by the act of 1879, offering to the creditors of the State a compromise, this class of bonds, issued after the act of 1866, calling for the collateral aforesaid, were scheduled at twenty-five cents on the dollar of their face, without anything for the overdue coupons; that petitioners are informed and believe that, at the time when this offer was made by the State, the stock in the North Carolina Railroad Company, owned by the State, was, according to market value, worth
286 less than a sufficiency to pay off the first mortgage, and for this reason, many of the holders of this class of bonds, seeing that their security could not realize anything for their benefit upon its then existing value accepted the compromise offered by the State, surrendered their bonds in exchange for 4 per cent. bonds of the State; that your petitioners, believing that the wealth of the State would increase in proportion to its great resources, and especially believing that the stock of the North Carolina Railroad Company would increase in value, declined to accept the offer of twenty-five cents on the dollar and decided to wait until their collateral should reach a value sufficient to pay off the first mortgage, and to pay off the second mortgage also; that the hopes and expectations of your petitioners have been more than realized, and the stock has risen in commercial value to a point where it is sufficient not only to pay off the first and second mortgage bonds, now outstanding, but to leave a large and valuable asset to the State, as has been set forth.

Your petitioners, in consideration of the foregoing facts, therefore say:

1. That the State is indebted to them as holders of the bonds particularly set forth in the exhibit to the petition in the sum of

$647,160, of which $234,000 is principal and the remainder is interest.

2. That they are entitled to a lien of a mortgage or pledge or security upon 2,340 shares of stock owned by the State in the North Carolina railroad, and upon the surplus of $346,000, which the State received as dividends upon the said stock since 1879 in excess
287 of the payment of interest on the first-mortgage bonds, which amount was appropriated by the State to its general purposes, in contravention of the rights of your petitioners.

3. Your petitioners further declare that the first-mortgage construction bonds are due and payable, so far as your petitioners are concerned, and that they are entitled to a sale of so much of the said North Carolina Railroad stock owned by the State as may be necessary to discharge the first-mortgage bonds in full, and out of the stock remaining to a sale of 2,340 shares, the proceeds to be credited as a payment on the amount due on the bonds owned by your petitioners.

4. Your petitioners further aver that under all the facts set forth above, they should be allowed access to the courts to assert their claim as set forth above, notwithstanding the fact that the State holds the title to its stock in the N. C. R. R. Co., subject to the pledges above set forth.

Your petitioners therefore respectfully ask that Your Excellency shall recommend to the General Assembly the passage of such legislation as will secure to your petitioners the payment of the amount set forth, either directly from the State, or by the enforcement of their lien upon the North Carolina Railroad stock, as above claimed, and the right to resort to the courts to prosecute their claim.

S. M. SCHAFER,
S. SCHAFER,
Partners Doing Business as Schafer Bros.,
By F. H. BUSBEE, *Attorney.*

NOTE.—The petitioners now own eight more bonds, making two hundred and forty-two in all.

288

EXHIBIT "A."

No.	Date.	Coupons from—	Signed by—		Maturity.	Endorsement signed by—
			Comptroller.	Treasurer.		
4398	July 1, 1867.	Jan., 1869.	S. W. Burgin.	Kemp P. Battle.	July 1, 1897.	Same officials.
4045	do	do	do	do	do	do
4048	do	do	do	do	do	do
4073	do	do	do	do	do	do
4075	do	do	do	do	do	do
4378	do	do	do	do	do	do
3935	do	do	do	do	do	do
4487	do	do	do	do	do	do
4489	do	do	do	do	do	do
4488	do	do	do	do	do	do
4551	do	do	do	do	do	do
4556	do	do	do	do	do	do
4555	do	do	do	do	do	do
3990	do	do	do	do	do	do
3991	do	do	do	do	do	do
4554	do	do	do	do	do	do
4550	do	do	do	do	do	do
4549	do	do	do	do	do	do
4552	do	do	do	do	do	do
4553	do	do	do	do	do	do
3873	do	do	do	do	do	do
4373	do	do	do	do	do	do
3982	do	do	do	do	do	do
289						
3983	July 1, 1867.	Jan., 1869.	S. W. Burgin.	Kemp P. Battle.	July 1, 1897.	Same officials.
3984	do	do	do	do	do	do
3986	do	do	do	do	do	do
3985	do	do	do	do	do	do
3988	do	do	do	do	do	do
3987	do	do	do	do	do	do
3989	do	do	do	do	do	do
4246	do	do	do	do	do	do
3815	do	do	do	do	do	do
4214	do	do	do	do	do	do
4240	do	do	do	do	do	do
3807	do	do	do	do	do	do
4416	do	do	do	do	do	do
3860	do	do	do	do	do	do
4415	do	do	do	do	do	do
4413	do	do	do	do	do	do
3861	do	do	do	do	do	do
4215	do	do	do	do	do	do
4227	do	do	do	do	do	do
4228	do	do	do	do	do	do
4370	do	do	do	do	do	do
4371	do	do	do	do	do	do
4462	do	do	do	do	do	do
4520	do	do	do	do	do	do
4225	do	do	do	do	do	do
4394	do	do	do	do	do	do

Exhibit "A"—Continued.

No.	Date.	Coupons from—	Signed by—		Maturity.	Endorsement signed by—
			Comptroller.	Treasurer.		
290						
4038	July 1, 1867.	Jan., 1869.	S. W. Burgin.	Kemp P. Battle.	July 1, 1897.	Same officials.
4521	do	do	do	do	do	do
4516	do	do	do	do	do	do
3773	do	do	do	do	do	do
4224	do	do	do	do	do	do
3910	do	do	do	do	do	do
4205	do	do	do	do	do	do
4108	do	do	do	do	do	do
4395	do	do	do	do	do	do
4405	do	do	do	do	do	do
4364	do	do	do	do	do	do
3930	do	do	do	do	do	do
4012	do	do	do	do	do	do
4365	do	do	do	do	do	do
3891	do	do	do	do	do	do
4091	do	do	do	do	do	do
3913	do	do	do	do	do	do
4248	do	do	do	do	do	do
4235	do	do	do	do	do	do
4299	do	July '69.	do	do	do	do
5248	Jan. 1, '68.	Jan., '69.	do	do	Jan. 1, '98.	do
4856	do	do	do	do	do	do
4884	do	do	do	do	do	do
4808	do	do	do	do	do	do
4855	do	do	do	do	do	do
291						
5857	Jan. 1, '68.	Jan., '69.	S. W. Burgin.	Kemp P. Battle.	Jan. 1, '98.	Same officials.
5623	do	do	do	do	do	do
5470	do	do	do	do	do	do
5378	do	do	do	do	do	do
5377	do	do	do	do	do	do
5389	do	do	do	do	do	do
5324	do	do	do	do	do	do
4711	do	do	do	do	do	do
4810	do	do	do	do	do	do
5384	do	do	do	do	do	do
4822	do	do	do	do	do	do
4823	do	do	do	do	do	do
5224	do	do	do	do	do	do
5225	do	do	do	do	do	do
4942	do	do	do	do	do	do
4943	do	do	do	do	do	do
4944	do	do	do	do	do	do
5657	do	do	do	do	do	do
5236	do	do	do	do	do	do
4988	do	do	do	do	do	do
5743	do	do	do	do	do	do
4971	do	do	do	do	do	do
4598	do	do	do	do	do	do
5800	do	do	do	do	do	do
5801	do	do	do	do	do	do
5818	do	do	do	do	do	do

Exhibit "A"—Continued.

No.	Date.	Coupons from—	Signed by—		Maturity.	Endorsement signed by—
			Comptroller.	Treasurer.		
292						
5816	Jan. 1, 1868.	Jan., 1869.	S. W. Burgin.	Kemp P. Battle.	Jan. 1, 1898.	Same officials.
5817	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
5342	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
5325	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
5326	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
5329	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
5343	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
5331	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
5330	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
5327	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
5328	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
5391	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
5390	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
5242	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
5244	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
5854	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
4877	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
4881	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
4875	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
4879	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
4878	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
5475	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
4620	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
4619	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
4874	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
4621	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
293						
4862	Jan. 1, 1868.	Jan., 1869.	S. W. Burgin.	Kemp P. Battle.	Jan. 1, 1898.	Same officials.
5661	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
4682	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
5371	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
4880	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
5344	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
4616	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
5291	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
4873	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
4896	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
5286	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
4610	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
4885	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
4883	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
4617	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
4882	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
4614	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
4876	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
4607	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
4606	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
4601	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
4656	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
4618	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
5883	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
5833	...do...	...do...	....do.....	.....do.....	...do...	.....do.....
5684	...do...	...do...	....do.....	.....do.....	...do...	.....do.....

Exhibit "A"—Continued.

No.	Date.	Coupons from—	Signed by—		Maturity.	Endorsement signed by—
			Comptroller.	Treasurer.		
294						
4605	Jan. 1, 1868.	Jan., 1869.	S. W. Burgin.	Kemp P. Battle.	Jan. 1, 1898.	Same officials.
4604	...do...	...do...	...do...	...do...	...do...	...do...
4603	...do...	...do...	...do...	...do...	...do...	...do...
4706	...do...	...do...	...do...	...do...	...do...	...do...
4645	...do...	...do...	...do...	...do...	...do...	...do...
4643	...do...	...do...	...do...	...do...	...do...	...do...
4644	...do...	...do...	...do...	...do...	...do...	...do...
4642	...do...	...do...	...do...	...do...	...do...	...do...
4641	...do...	...do...	...do...	...do...	...do...	...do...
4640	...do...	...do...	...do...	...do...	...do...	...do...
4639	...do...	...do...	...do...	...do...	...do...	...do...
4636	...do...	...do...	...do...	...do...	...do...	...do...
4637	...do...	...do...	...do...	...do...	...do...	...do...
4638	...do...	...do...	...do...	...do...	...do...	...do...
5759	...do...	...do...	...do...	...do...	...do...	...do...
5688	...do...	...do...	...do...	...do...	...do...	...do...
5763	...do...	...do...	...do...	...do...	...do...	...do...
5215	...do...	...do...	...do...	...do...	...do...	...do...
5218	...do...	...do...	...do...	...do...	...do...	...do...
5217	...do...	...do...	...do...	...do...	...do...	...do...
5216	...do...	...do...	...do...	...do...	...do...	...do...
5214	...do...	...do...	...do...	...do...	...do...	...do...
5683	...do...	...do...	...do...	...do...	...do...	...do...
5270	...do...	...do...	...do...	...do...	...do...	...do...
4982	...do...	...do...	...do...	...do...	...do...	...do...
4985	...do...	...do...	...do...	...do...	...do...	...do...
295						
5853	Jan. 1, 1868.	Jan., 1869.	S. W. Burgin	Kemp P. Battle.	Jan. 1, 1898.	Same officials.
5707	...do...	...do...	...do...	...do...	...do...	...do...
4984	...do...	...do...	...do...	...do...	...do...	...do...
4981	...do...	...do...	...do...	...do...	...do...	...do...
5770	...do...	...do...	...do...	...do...	...do...	...do...
5532	...do...	...do...	...do...	...do...	...do...	...do...
5533	...do...	...do...	...do...	...do...	...do...	...do...
4582	...do...	...do...	...do...	...do...	...do...	...do...
5638	...do...	Jan., '70	...do...	...do...	...do...	...do...
5636	...do...	...do...	...do...	...do...	...do...	...do...

Exhibit "A"—Continued.

296 No.	Date.	Coupons from—	Signed by—		Maturity.	Endorsement signed by—	
			Governor.	Treasurer.		Auditor.	Treas'r.
5986	Oct. 1, 1868.	April, 1869.	W. W. Holden.	D. A. Jenkins.	Oct. 1, 1898.	H. Adams.	D. A. Jenkins.
6195	do.	do.	do.	do.	do.	do.	do.
5919	do.	do.	do.	do.	do.	do.	do.
6149	do.	do.	do.	do.	do.	do.	do.
6151	do.	do.	do.	do.	do.	do.	do.
6147	do.	do.	do.	do.	do.	do.	do.
6121	do.	do.	do.	do.	do.	do.	do.
6120	do.	do.	do.	do.	do.	do.	do.
6125	do.	do.	do.	do.	do.	do.	do.
6148	do.	do.	do.	do.	do.	do.	do.
6062	do.	do.	do.	do.	do.	do.	do.
6175	do.	do.	do.	do.	do.	do.	do.
6176	do.	do.	do.	do.	do.	do.	do.
6183	do.	do.	do.	do.	do.	do.	do.
6092	do.	do.	do.	do.	do.	do.	do.
6093	do.	do.	do.	do.	do.	do.	do.
6094	do.	do.	do.	do.	do.	do.	do.
6095	do.	do.	do.	do.	do.	do.	do.
6096	do.	do.	do.	do.	do.	do.	do.
6118	do.	do.	do.	do.	do.	do.	do.
6117	do.	do.	do.	do.	do.	do.	do.
6116	do.	do.	do.	do.	do.	do.	do.
6115	do.	do.	do.	do.	do.	do.	do.
6114	do.	do.	do.	do.	do.	do.	do.
6101	do.	do.	do.	do.	do.	do.	do.
297							
6100	Oct. 1, 1868.	April, 1869.	W. W. Holden.	D. A. Jenkins.	Oct. 1, 1898.	H. Adams.	D. A. Jenkins.
6099	do.	do.	do.	do.	do.	do.	do.
6098	do.	do.	do.	do.	do.	do.	do.
6097	do.	do.	do.	do.	do.	do.	do.
6085	do.	do.	do.	do.	do.	do.	do.
6083	do.	do.	do.	do.	do.	do.	do.
6084	do.	do.	do.	do.	do.	do.	do.
6087	do.	do.	do.	do.	do.	do.	do.
6086	do.	do.	do.	do.	do.	do.	do.
5975	do.	do.	do.	do.	do.	do.	do.
5966	do.	do.	do.	do.	do.	do.	do.
6059	do.	do.	do.	do.	do.	do.	do.
5967	do.	do.	do.	do.	do.	do.	do.
6029	do.	do.	do.	do.	do.	do.	do.
6131	do.	do.	do.	do.	do.	do.	do.
6217	do.	Oct., '69	do.	do.	do.	do.	do.
6218	do.	do.	do.	do.	do.	do.	do.
6231	do.	do.	do.	do.	do.	do.	do.
6225	do.	do.	do.	do.	do.	do.	do.
6226	do.	do.	do.	do.	do.	do.	do.
6232	do.	do.	do.	do.	do.	do.	do.

298 EXHIBIT "B."

No. 3935.

UNITED STATES OF AMERICA.

(This certificate of debt is not subject to taxation for any purpose whatever.)

It is hereby certified that

THE STATE OF NORTH CAROLINA

Justly owes to —— ——, or bearer, one thousand dollars, redeemable in good and lawful money of the United States, at the National Bank of the Republic in the city of New York, on the 1st day of July, 1897, with interest thereon at the rate of 6 per cent. per annum, payable half yearly at the said bank on the 1st days of January and July in each year from the date of this bond and until the principal be paid on surrendering the proper coupon hereto annexed.

In witness whereof, the treasurer of the said State, in virtue of power conferred by law, hath signed this bond, and caused the seal of his office to be hereto affixed, and her comptroller hath countersigned the same at the seat of government of the said State, this 1st day of July, 1867.

KEMP P. BATTLE,
Public Treasurer.

Countersigned:
S. W. BURGIN, *Comptroller.*

299 (Issued by authority of an act of the legislature of North Carolina to incorporate the Western North Carolina Railroad Company, chapter 228.)

Coupon.

The State of North Carolina will pay to bearer at the National Bank of the Republic, in the city of New York, on the 1st day of January, 1869, thirty dollars on bond 3935 for $1,000.

$30. KEMP P. BATTLE,
Public Treasurer.

And the said bond contains the following indorsement on the back thereof:

STATE OF NORTH CAROLINA:

TREASURY DEPARTMENT, RALEIGH, *July* 1, 1867.

Under the provisions of an act of the General Assembly of North Carolina entitled "An act to enhance the value of the bonds to be issued for the completion of the Western North Carolina Railroad Company, and for other purposes," ratified 19th December, 1866, ten shares of the stock in the North Carolina Railroad Company, originally subscribed for by the State, are hereby mortgaged as collateral security for the payment of this bond.

Witness the signature of the public treasurer and seal of office, and the counter-signature of the comptroller.

KEMP P. BATTLE,
Public Treasurer.

S. W. BURGIN, *Comptroller.*

300 EXHIBIT "C."

RALEIGH, N. C., —— —, 1886.

The commissioners appointed under the act of 14th of March, 1879, to adjust and renew that portion of the State debt incurred to aid in the construction of the North Carolina railroad, announce that they are prepared to execute the act according to the terms of the following agreement, which has been subscribed to by the holders of a very large amount of the bonds:

"1. Whereas, under an act of the General Assembly of North Carolina, ratified on the 14th day of March, A. D. 1879, entitled 'An act to adjust and renew a portion of the State debt,' the governor of said State was authorized to appoint three commissioners to carry said act into execution, by the exchange of the bonds therein mentioned for new bonds, to be issued by the said State under the provisions of the said act; and whereas, George Davis, Montford McGehee and Donald W. Bain have been appointed by the governor of the said State commissioners for the purposes mentioned in said act: Now, therefore, we, the undersigned, holders of bonds of the said State in said act mentioned and described, do hereby severally, and not jointly, propose and agree to and with the said George Davis, Montford McGehee and Donald W. Bain, to exchange with them, as commissioners as aforesaid, all of the said bonds owned, held and controlled by us, respectively, in the following terms, viz:

"2. We are to deliver said bonds to said commissioners, with coupons attached thereto, falling due on the 1st day of July,
301 1878, or the 1st day of October, 1878, as the case may be, and all coupons falling due subsequent to that date. In case any of said coupons have been detached from said bonds and are not delivered therewith, the amount of such detached coupons shall be noted on the certificate of the commissioners, and in the issuing of

the new bonds the treasurer shall cut off from them and retain the first maturing coupons for thirty dollars, to the amount of the missing coupons, and shall deliver the coupons so cut off to the holders of the said old missing coupons, in exchange therefor, whenever the same shall be presented. The balance due on coupons of said bonds due anterior to the 1st day of July, 1878, is to be paid without interest out of the balance of dividends on the stock owned by the State in the North Carolina Railroad Company, not heretofore distributed in the suit known as the Swazey suit (hereinafter mentioned); and if that is not sufficient for that purpose, then, out of the surplus of the dividends on the stock owned by the State in the said railroad company, which shall not be applied to the payment of the interest on the new State bonds to be issued under the said act.

"3. In exchange for the bonds thus delivered by us we are to receive new bonds equal in amount to the principal of the bonds delivered by us to said commissioners, which shall be issued by the said State in all respects in accordance with the provisions of the act above referred to, with semi-annual coupons, attached thereto for interest of thirty dollars each, the first of which shall become due and payable on the 1st day of October, 1882, except that the first coupon of the new bonds issued in renewal of the old January and July bonds shall be for forty-five dollars instead — thirty dollars, so that the interest on each class of bonds may be equal-
302 ized, it being the intention of this contract that the bondholders shall rebate to the State two hundred and forty dollars of interest on each bond delivered for renewal.

"4. The surplus of the dividends received under said act on the stock owned by the State in the North Carolina Railroad Company, and applicable to the said old bonds, after paying the interest on said new bonds, shall remain as and constitute a sinking fund for the payment of the interest due before the 1st day of July, 1878, on such of the said old bonds as have not been presented and proved in the suit known as the Swazey suit, now pending in the United States circuit court for the eastern district of North Carolina; and after such interest is paid, then for the payment of interest and principal of the said new bonds issued under said act, and shall be sacredly held and applied to this purpose and none other; and such surplus shall be invested in the purchase of the new 4 per cent. bonds of the said State; and all of the bonds thus purchased shall be stamped and marked as the sinking fund for that purpose.

"5. The certificate for the stock owned by the State in the North Carolina Railroad Company shall be held by the public treasurer, after the same shall have been returned to the State by order of the court in the said Swasey suit until the said new bonds are paid in full, and no lien, mortgage, or other incumbrance shall be placed or made on the said stock, or by the said railroad company, which shall have a priority over the lien of said bonds on said stock.

"6. And it is understood and is hereby expressly declared to be the true intent and meaning of this agreement that the new bonds

to be issued hereunder are given, not in payment but in re-
303 newal and extension only of the old bonds, and without prejudice to the lien of the said old bonds on the State's stock in the North Carolina Railroad Company, which lien is preserved unimpaired for the security of the new bonds as fully as the old bonds are now secured thereby.

"The undersigned commissioners for the State of North Carolina, appointed under and by virtue of the act of the 14th March, 1879, entitled 'An act to adjust and renew a portion of the State debt,' do hereby, in behalf of the said State, approve, ratify and adopt the annexed and foregoing agreement and contract.

"GEO. DAVIS,
"M. McGEHEE,
"D. W. BAIN,
"*Commissioners.*"

"Executive and treasurer's offices.

"RALEIGH, *June* 14, 1882.

"We, the undersigned, governor and treasurer of North Carolina, having examined the plan of adjustment of that part of the State debt contracted for the construction of the North Carolina railroad as set forth in the foregoing contract, do hereby approve the same and do fully authorize, so far as we are empowered to do the commissioners to proceed with the settlement as set forth in said contract.

"THOS. J. JARVIS, *Governor.*
"J. M. WORTH,
"*Public Treasurer.*"

By the terms of the agreement the old bonds are to be de-
304 livered to the commissioners, with coupons attached, falling due July 1, 1878, or October 1, 1878, inclusive, as the case may be, and all coupons falling due subsequent to that date.

The commissioners will, as required by the act, issue to such person delivering the old bonds a certificate setting forth the number and amount of new bonds to which he may be entitled in renewal thereof. Upon the presentation of the certificate to the treasurer of State, he will deliver to the owner the new bonds, with coupons attached, from October 1, 1882, inclusive, subject to the provisions of paragraph 2 of the contract.

The new bonds run forty years.

The commission of one-half of one per cent. ($5 per bond), which the commissioners are to receive under the act, is upon the face of the bond, the same to be paid when the bonds and coupons are delivered to the commissioners.

The commissioners are prepared to issue the certificates and the State treasurer will issue the new bonds.

Packages of bonds transmitted by express should be addressed to C. M. Busbee, secretary of the commission, at Raleigh, charges pre-

paid, and bonds presented by the holders in person will be received by him at the office of the State treasurer.

GEORGE DAVIS,
MONTFORD McGEHEE,
CHARLES M. BUSBEE,
Commissioners.

TREASURY DEPARTMENT, RALEIGH, N. C.

The new bonds to be given in renewal of the bonds, as set forth in the foregoing circular of the commissioners, will be issued
305 from this department to the owner in person or an authorized attorney, upon the presentation of the certificate of the commissioners, and giving a receipt for them.

When old bonds are sent to the commissioners per express, the new bonds will be returned in the same manner, unless otherwise ordered, the agent of the express company receipting for them.

D. W. BAIN, *Treasurer.*

NOTE.—Mr. C. M. Busbee was appointed commissioner on the resignation of D. W. Bain, elected State treasurer.

Date of bond.	Middle section of page 300.	Western North Carolina railroad.	Name of person surrendering bonds.	Residence of person surrendering bonds.	Date of exchange.	Class II.
*[3898 July 1, 1867]	After this entry had been made and the new bonds prepared ready for the signatures of the governor and State treasurer, and before the new bonds were signed Mr. Lichtenauer ordered the return to him of these old bonds, which was done. The cancellation had been stamped into these bonds, and the State treasurer signed a certificate written on each of these bonds, which read as follows:—"This bond was sent to the State treasury department by Mr. J. M. Lichtenauer 20–22 Broad street, New York, and the cancellation stamped in it in anticipation of the issue of new four per cent. consolidated debt bonds, for which it was exchangeable. Before the new four per cent. bonds were executed Mr. Lichtenauer withdrew these bonds. The cancellation was premature and does not affect this bond. No new bond or bonds has or have ever been issued for this bond. The State treasurer returned it to Mr. Lichtenauer at his request." W. H. WORTH, *State Treasurer.* State treasury department, Raleigh, N. C., this October 30, 1900.	*[1000]	*[Joseph M. Lichtenauer, 22 Broad St., N. Y.]	*[20 Broad St., N. Y.]	*[Oct. 24, 1900.]	*[1000]
*[3899 July 1, 1867]			" "	"	"	*[1000]
*[3900 July 1, 1867]		*[1000]				*[C. 2691]
*[3901 July 1, 1867]			" "	"	"	*[1000]
(10)						*[C. 2692]
*[3902 July 1, 1867]		*[1000]	" "	"	"	*[1000]
*[3903 July 1, 1867]		*[1000]	" "	"	"	*[1000]
*[3904 July 1, 1867]		*[1000]	" "	"	"	*[1000]
*[3905 July 1, 1867]		*[1000]	" "	"	"	*[1000]
		*[1000]	" "	"	"	*[1000]
						*[8000]

*[Words and figures enclosed in brackets erased in copy.]

307 (Endorsed on envelope:) Hon. Jas. H. McKenney, clerk U. S. Supreme Court, Washington, D. C. From Ed. S. Battle, com'r. Registered Dec. 10, 1902 Raleigh, N. C. Registered, Washington, D. C. Dec. 12, 1902. Office Supreme Court of U. S. Received Dec. 13, 1902. Opened in open court by order of court and filed the 15th of December, 1902. Jas. H. McKenney, clerk Sup. Court, U. S.

Endorsed: Supreme Court U. S. October term, 1902. Term No. 9, original. The State of South Dakota, complainant, vs. The State of North Carolina *et al.* Depositions of Miles Osborne, Sherrill and Kemp Plummer Battle for complainant, & Chas. B. Aycock, Dr. J. J. Mott, H. C. Cowles, Daniel L. Russell, Fabius H. Busbee & Wm. H. Worth for defendants, & Exhibits A, B, C, D, E, F, & G. Filed Dec. 15, 1902.

308 EXHIBIT G.

CHAPTER 98, LAWS OF 1866–'67.

An act to authorize the president and directors of the Western North Carolina Railroad Company to put said road under contract.

Whereas, the charter of the Western North Carolina Railroad Company requires the road to be built by sections, putting the light work under contract at the same time with the heavy work, greatly to the injury of the State and company: Therefore,

SECTION 1. Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same, That the president and directors of the Western North Carolina Railroad Company are hereby authorized and empowered to put under contract, at any time they may deem advisable, any portion of said road to its western terminus (Duck Town copper mines) embracing its branch down the French Broad river to Paint Rock. Whenever one-third of the estimated cost of said portions or sections, (such portions or sections to embrace at least fifty thousand dollars worth of work at the estimated cost,) have been subscribed by solvent individuals, counties, corporations, or contractors, the treasurer of the State is hereby authorized and directed to issue bonds of the State for the remaining two-thirds, as provided by an act passed at the present session of the General Assembly, (entitled An*d* act "to enhance the value of the bonds to be issued for the Western North Carolina railroad, and for other purposes,") upon the certificate of the president of said road to the board of internal improvements,
309 that the stock has been subscribed as above required, and from time to time, as the stock is thus subscribed and certified to by the president of the company, the treasurer of the State is authorized and directed to issue said bonds until the road is completed.

SEC. 2. Be it further enacted, That the president and directors of the said Western North Carolina Railroad Company be and they are hereby authorized and empowered to issue bonds of the com-

pany, (as provided by the second section of the above-recited act, passed at the present session of the General Assembly, and ratified on the 19th day of December, A. D. 1866,) at any time and sell the same and apply the proceeds arising from the sale of said bonds to the Main Trunk road from the French Broad river, west, and the branch down the French Broad river, equally in proportion to the length of each, and from time to time, as fast as any portion of said road and its branch is completed, to issue said bonds and sell and apply to said road until it is finished to its western terminus, (at or near Ducktown copper mines).

SEC. 3. Be it further enacted, That the Western North Carolina Railroad Company are fully authorized and empowered to receive in payment of subscription from individuals, corporations, companies, or counties, lands at such valuation as may be agreed upon at the time of subscribing, by the company or its authorized agents on the one part, and such individuals, corporations, companies or counties as may subscribe to said railroad, with the understanding that payment is to be made in this way: Provided, that the stock subscribed in lands under this section, shall be fixed at a cash valuation in gold at the time of subscribing, and said lands to be
310 held by the company for sale at any time, or to be mortgaged by the company to raise the amount subscribed on the part of individuals, companies, counties or corporations: And provided further, that the State and company are to have the benefits arising from the increased value of the lands so subscribed: Provided, further, that the State treasurer shall not be called upon for the State subscription when the individual subscription is made in land, until the directors shall have realized the estimated value in money.

SEC. 4. Be it further enacted, That there shall be no discrimination, by the authority of said Western North Carolina Railroad Company, either in the rates of freight or travel, or in the running of trains, against the Wilmington, Charlotte and Rutherford Railroad Company, from the point of connection between said roads, wherever they may be, westward.

SEC. 5. Be it further enacted, That this act shall be in force from and after its ratification.

Ratified the 27th day of February, A. D. 1867.

I certify that the foregoing is a true and accurate copy of the act set forth in evidence.

ED. S. BATTLE,
Commissioner.

Endorsed: Office Supreme Court of U. S. Received Jan. 10, 1903.

Endorsed: Supreme Court U. S. October term, 1902. Term No. 9, orig'l. The State of South Dakota complainant, *vs.* The State of North Carolina *et al.* Exhibit G to depositions taken by E. S. Battle. Filed Jan'y 10, 1903.

311 In the Supreme Court of the United States.

THE STATE OF SOUTH DAKOTA, Complainant,
vs.
THE STATE OF NORTH CAROLINA, CHAS. SALTER, and SIMON Rothschilds, Defendants.

Notice for Taking Testimony.

To the complainant above named, and to Hon. D. L. Russell, Hon. Alfred Russell, and Hon. Wheeler H. Peckham, of counsel for complainant:

Please take notice that pursuant to the order of this honorable court filed herein on May — 1902, and to the stipulation of counsel heretofore made and filed herein, the complainant will take the testimony of Charles H. Burke whose address is House of Representative- Washington, D. C., orally *as* the same manner as provided for the taking of testimony in the circuit courts of the United States sitting in equity, by rule 67 of the rules of practice in equity promulgated by the Supreme Court of the United States, for use on the part of the defendant at the final hearing herein, before A. D. Watts, the commissioner designated and appointed by said stipulation to take depositions at the instance of either party herein in the city of Washington at the office of Hon. F. M. Simmons, Senate an-
312 nex, Maltby building on the 13th day of December, 1902, at 12 o'clock and thereafter from day to day as the taking of such testimony may be adjourned.

Dated Dec. 3rd, 1902.

JAS. E. SHEPHERD,
Of Counsel for Defendant State of North Carolina.

(S'd.) Agreed Dec. 5 / 02.

WHEELER H. PECKHAM,
Of Counsel for Complainant.

I hereby accept service of the within notice, Dec. 11, 1902.

CHAS. H. BURKE.
MARION BUTLER.

In the Supreme Court of the United States, October Term, 1901.

THE STATE OF SOUTH DAKOTA, Complainant,
vs.
THE STATE OF NORTH CAROLINA, CHARLES Salter, and Simon Rothschilds. } No. 11. In Equity.

Pursuant to a stipulation of counsel hereto attached, I, A. D.
313 Watts, commissioner under authority thereof, on the 13th day of November, A. D. 1902, at the office of Honorable F. M. Simmons, Senate annex, Maltby building, city of Washington, Dis-

trict of Columbia, proceeded to take depositions and to the examination of witnesses in the above-entitled case, as follows.

Present: James E. Shepherd, Esq., and George Rountree, Esq., attorneys and counsel for the defendant, The State of North Carolina, Daniel L. Russell, Esq., attorney and counsel for the defendant Charles Salter; the complainant, The State of South Dakota and the defendant Simon Rothschilds not being present, either in person or by attorney. By request of parties it is ordered that these depositions be taken by question and answer.

CHARLES H. BURKE, a witness produced on behalf of the defendant, The State of North Carolina, being first duly sworn deposes and says in answer to interrogatories propounded to him by Mr. Rountree of counsel for the defendant, The State of North Carolina, as follows:

Q. #1. State your name, age, residence and occupation.

A. My name is Charles H. Burke, residence Pierre, South Dakota, age 41 years, at present one of the members of the House of Representatives from South Dakota.

Q. #2. Are you a lawyer by profession?

A. I am.

Q. #3. Mr. Burke, you delivered these bonds donated by Mr. Shafer to the authorities of the — South Dakota?

A. I did.

Q. #4. Can you tell me when that was as nearly as may be?

A. I am unable to state exactly when.

314 Q. #5. When did you receive these bonds and from whom?

A. I received them some time in September 1901, I think. The bonds when I received them were delivered into my possession by Mr. Stewart—that is my recollection.

Q. #6. Where was Mr. Stewart at that time when he delivered these bonds to you?

A. I think it was at Huron, South Dakota.

Q. #7. The Mr. Stewart to whom you refer is the Mr. R. W. Stewart of South Dakota?

A. I will explain, if you will permit me. I was away from home a considerable portion of the time during the summer of 1901. I left the State some time in July, I think, and was away until some time in September. I left directions that if any bonds were received for the State of South Dakota to deliver them to Mr. Stewart and when I returned from New York Mr. Stewart met me at Huron, having first wired me to know when I would be home, with the bonds and delivered them into my hands.

Q. #8. Do you know how they came to him?

A. I do not.

Q. #9. Do you know whether they were delivered to him in person and by whom, or whether they were delivered by express or through the mails?

A. I really do not know.

Q. #10. When did you first know of these bonds and of the purpose and intent of Mr. Shafer to make the donation?

A. Now that is rather a difficult question to answer, and the only way I can answer it as to these bonds and as to Mr. Shafer or
315 Shafer Brothers, will be that it was some time during the summer of 1901 as to these particular bonds and as to Shafer Brothers.

Q. #11. I understand you then to say that you first heard of Shafer Brothers' connection with these particular bonds, the 10 that were donated to the State of South Dakota, some time during the summer of 1901.

A. That is my recollection.

Q. #12. From whom did you get that information?

(Objection by counsel for defendant Charles Salter as irrelevant and hearsay.)

A. Senator or ex-Senator R. F. Pettigrew.

Q. #13. Will you tell us where you were when you got that information from Mr. Pettigrew?

(Objection by counsel for defendant Charles Salter as irrelevant and hearsay.)

—. I think it was in his office in Sioux Falls, South Dakota.

Q. #14. Was he counsel for any of the holders of that class of bonds at that time, to your knowledge?

A. Not to my knowledge, he did not say that he was.

Q. #15. Did he say anything about any one's holding several of the bonds and their efforts to collect them?

(Objection by counsel for defendant Charles Salter as irrelevant and hearsay.)

A. I am inclined to think that there was something of that kind said.

Q. #16. Will you Mr. Burke, just state in your own way all that you know about the bonds of the class sued on by the State
316 of South Dakota in this action, who held them, what their purposes were, and all the information you have on the subject. That will enable us to let you get through on the subject.

(Objection by counsel for defendant Charles Salter as irrelevant and hearsay.)

A. Some time in the month of February, toward the latter part of the month, as I remember it, in 1901, Senator Pettigrew in the House of Representatives said to me in substance that he thought he knew of certain parties who would make a donation to the State of South Dakota and had something to say about certain bonds. I remember distinctly that he spoke of southern bonds, and he may have mentioned two or three different States. I am not certain that he did, and I do not remember whether he mentioned specifically North Carolina or not. I am very certain that he did not mention Shafer Brothers. If *I* he had mentioned them I am not certain that

I would have recollected it, as I had never heard of them, but I do not remember that he did mention Shafer Brothers. He stated that if a donation was made to the State a law would have to be passed in order that the State might receive it, and asked me if I would bring it to the attention of the legislature, stating that if I did so and a law was passed and anything was given to the State at any time that it might go through me and that it might do me some good, or words to that effect. I presume he meant politically. I think he also stated that a similar law had been enacted by certain other States—I think he said that. I stated to him that I saw no reason why I should not ask such a bill to pass.

317 I sent or wrote a letter that same morning to Mr. Stewart of Pierre, who is a particular friend, stating in substance that I had received information that possibly some donation might be made to the State, and that such a law ought to be passed. A few days later I was called home to Pierre and while there Mr. Stewart told me that the bill had passed the Senate. I saw the chairman of the Committee on Judiciary in the House of Representatives and told him that I hoped that the bill might receive consideration. It was then late in the session. I thought it was a good bill. I did not go into any detailed explanation whatever in regard to it and the bill subsequently passed. That is substantially all I know about the transaction up to this time.

Q. # 17. Did you ever come in contact with the Shafers in reference to this business?

A. I never have—not personally; I presume you mean personally.

Q. # 18. Are you counsel for them or any of the holders of the same class of bonds?

A. I am not.

Q. # 19. When Senator Pettigrew spoke to you about these bonds and the necessity for the passage of this bill, did he say anything about the necessity of bringing a suit in the Supreme Court in order to recover on these southern bonds?

(Objection by counsel for defendant Charles Salter as irrelevant, immaterial and hearsay.)

A. I do not think anything was said about any suit.

Q. # 20. Did he say that these southern bonds to which he

318 had reference a had been disavowed or repudiated by any of the States issuing them?

(Objection by counsel for defendant Charles Salter as irrelevant, immaterial and hearsay.)

A. I think he did.

Q. # 21. Did he say that it would or might be necessary for the State to bring an action to recover on them?

A. I do not think he did, because there — no specific bonds mentioned and there was no certainty that the State would ever get any bonds.

Q. # 22. Prior to September 21, 1901, did any one owning or representing the owners of this class of bonds say anything to you about

the necessity or the probability or the possibility of the State of South Dakota maintaining a suit on these bonds and if so, who was it?

(Objection by counsel for defendant Charles Salter as irrelevant, immaterial and hearsay.)

A. After the very brief conversation which I had in the House of Representatives with Senator Pettigrew in the month of February, 1901, my recollection is I did not see him again or hear from him until I saw him in his office at Sioux Falls at the time which I have stated. I asked if there had been or would — any donation of anything to the State, referring to the conversation I had with him in the month of February, and my recollection is that at the time he mentioned to me the name of Shafer Brothers of New York, stating that they would or it was thought they would donate to the State some bonds. He probably stated or said something about a suit or rather that it might be necessary for the State to sue in order
319 to recover upon the bonds, and that it would probably be necessary for it to do so, but I am not clear as to that.

Q. #23. You did not come into contact with Governor Russell or Mr. Shafer of New York before this time in September, 1901?

(Objection by counsel for defendant Charles Salter as irrelevant and immaterial.)

A. I never conversed with any person connected with this transaction representing the State of North Carolina, Shafer Brothers or any bondholders or any one else connected with or owning these bonds prior to the commencement of this action except as I have stated. I never met Governor Russell in my life until I met him some time after the middle of January 1902.

Q. #24. Where is Senator Pettigrew now?

(Objection by counsel for defendant Charles Salter as irrelevant and immaterial.)

A. I do not know.

Cross-examination.

By counsel for defendant Charles Salter:

X Q. #1. Please state whether there was in the donation of these bonds which you delivered to the State of South Dakota any condition imposed by the donor as to the bringing of a suit by South Dakota on the bonds?

A. Absolutely none.

X Q. #2. Please state whether there was any agreement or understanding, express or implied, that South Dakota should bring a suit on the bonds.

(Objection by counsel for State of North Carolina as being
320 irrelevant, immaterial and calling for the opinion of the witness.)

A. Not to my knowledge.

X Q. #3. Please state whether the assignment to South Dakota was unconditional and absolute.

(Objection by counsel for the State of North Carolina as being irrelevant, immaterial and calling for the opinion of the witness.)

A. It was.

X Q. #4. Suppose, Mr. Burke, that South Dakota after receiving these bonds had accepted the 25 cents on the principal of them which was and is offered by North Carolina, could South Dakota have done so without committing any breach of faith or breach of any agreement with the assignor or any one else?

(Objection by counsel for State of North Carolina as being irrelevant, immaterial and calling for the opinion of the witness.)

A. I know of no reason why the State could not have done so.

X Q. #5. Why the State could not have done so?

A. I know of no reason why it could not have done so.

X Q. #6. You delivered these bonds and acted for the assignor in doing so, did you not?

A. I did.

X Q. #7. Then you must know of your own knowledge whether there was any condition or agreement or understanding as mentioned in these former questions, do you not?

(Objection by counsel for the State of North Carolina, because the question is argumentative and calls for an opinion when the
321 facts to which he has already testified speak for themselves.)

(Remark by counsel for defendant Charles Salter: "It is asking for the knowledge of the witness in express words and is not asking for an opinion.")

A. There were no conditions whatever. I think I stated to the governor that they were delivered to the State without any condition, except a suggestion that the assignor hoped that the proceeds of them might go to aid the State university; I think there was something of that kind. Of course the governor could not control them.

X Q. #8. I understand you to mean that the disposition of the bonds or their proceeds would be entirely a matter for the legislature of South Dakota?

A. Yes sir.

Re-examination.

By counsel for the State of North Carolina:

R. Q. #1. You had two conversations with Governor Herriod and Attorney General Pyle with reference to these bonds, did you not, two or three weeks apart?

A. I do not recall ever talking with the attorney general about it but once. I think I did with the governor, I think I did.

R. Q. #2. At the consultation which you had with Governor Herriod and Attorney General Pyle, Mr. Stewart was present, was he not?

322 A. He may have been, but I am not clear about that.

R. Q. #3. In that consultation was there not some discussion as to the probable amount which the State would realize on those bonds, and was it not suggested that it would be necessary to bring a suit?

A. At some time, I think subsequent to the donation, there was a conversation at which I was present about a suit, at which my recollection is that Attorney General Pyle was present, the governor and Mr. Stewart, but I am not clear in regard to it.

R. Q. #4. Mr. Burke, this conversation took place at one of the two interviews to which you have referred, did it not?

A. I am positive it did not occur when the bonds were delivered; it might have been before but I am quite certain it was after.

R. Q. #5. Was it before the suit was actually brought?

A. I presume it was, but I do not know.

R. Q. #6. When you say that you were representing the assignors, you mean through Senator Pettigrew, whose agency you have previously testified to, do you not.

A. I held no communication with reference to these bonds with any one except Senator Pettigrew, except that I think that a letter was delivered with the bonds.

R. Q. #7. In your testimony-in-chief you gave all of the facts as you remember them with reference to the donation of these bonds, did you not?

A. I did as far as I remember it.

R. Q. #8. Do you know anything about what took place between the Shafers and Senator Pettigrew or any one else represent-

323 ing the Shafers?

A. Absolutely nothing.

R. Q. #9. Do you know whether Senator Pettigrew held any communication with the reference to the donation of these bonds and their disposition with the attorney general or Mr. Stewart or Governor Herriod?

A. I do not know; I never heard that he did.

Recross-examination.

By counsel for defendant Charles Salter:

R. X Q. #1. I understand you to say that you never heard anything about a suit to be brought on these bonds except in a conversation between the governor and attorney general, and that your best recollection is that was after the delivery of the bonds?

A. That is my recollection.

R. X Q. #2. You do not know when this suit was brought, do you?

A. I do not.

R. X Q. # 3. Then this conversation about a suit may have been after the suit was brought?

A. I think it was before; I am not clear exactly.

Re-re-examination.

By counsel for the State of North Carolina:

324 R. R Q. # 1. You do not desire to qualify what you said with reference to the conversation you had with Senator Pettigrew with reference to a suit and the conversation with the governor and the attorney general?

A. You asked me whether there was anything said relative to a suit on these bonds before they were donated between Senator Pettigrew and myself. I stated and I now state that my recollection is that he mentioned something about the State having repudiated the bonds and that a suit might have to be brought to collect them, but the matter of bringing a suit he certainly did not control, and it would be with the legal department of the State, I suppose. That is the supposition.

CHARLES H. BURKE.

The foregoing deposition of Charles H. Burke was sworn to and subscribed before me at the time and place above mentioned.

A. D. WATTS,
Commissioner.

MARION BUTLER, a witness produced on behalf of the defendant, The State of North Carolina, first being duly sworn, deposes and says in answer to interrogatories propounded to him by Mr. Shepherd, of counsel for the defendant, The State of North Carolina, as follows:

1. Where do you reside Mr. Butler, and what is your position for the last few years?

My legal residence is Raleigh, North Carolina; I am an
325 attorney; I was in the Senate from March 4th, 1895 to 1901.

2. During your service as Senator did you make the acquaintance of Senator Pettigrew from South Dakota?

I did.

3. Since this have you not been associated with him in a business enterprise, or enterprises?

I am associated with him now in several enterprises.

4. State what conversation you had with Senator Pettigrew in reference to North Carolina bonds, which is the subject of this suit?

(Counsel for the defendant, Salter, objects on the ground that the question is irrelevant and hearsay.)

Some time in January or February 1901, I had a conversation with him which probably lead up to the passage of the act of the legislature in South Dakota authorizing that State to accept dona-

tions. Previous to that time, during the campaign of 1900, I spent several weeks in South Dakota in the campaign assisting Senator Pettigrew in his fight for re-election. During that time I visited nearly every State institution except the State university. Upon inquiring of Senator Pettigrew the condition of the university, and discussing the other State institutions which I had visited, he stated that it was in bad financial condition and that he had made efforts to secure some donations to supplement, what I think he referred to, the pittance appropriated by the legislature. I think he said that he had approached Mr. Andrew Carnegie and others, but he had failed to secure any cash, or tender of cash for the university, but that Mr.
Carnegie had proposed, that in the line of his general donations
326 for libraries he might consider making a cash donation for a
library at Sioux Falls, South Dakota, and that he might make a tender of some securities of some kind to the university, or for some educational or charitable purpose in the State, in response to the request. This was all casual conversation, from time to time, while I was a guest of Senator Pettigrew in South Dakota, and the details are not clear in my mind. After the assemblying of Congress the following winter, he told me on one occasion that Mr. Carnegie had either made the gift to the library at Sioux Falls of $25,000, or assured him that he would make it, and in the conversation he suggested that he had been advised that probably the State could not accept donations, if they were not in cash, or something to that effect. Whereupon I suggested to him, either during that conversation or later on, when he was showing me on one occasion the architect's design for the public library, that I thought it would be a good idea for the State to enact a law authorizing the governor, or the proper officer, to receive donations made to the State. He said he wished they had such a law, but that he had been defeated and did not control the legislature, but that he thought if the matter was brought to the attention of either one of the Congressmen, who were Republicans, that they would gladly pass the act and he would suggest the matter to them; and further that they might have any credit which would arise from personal instrumentality in securing donations to the State, if they were instrumental in securing the passage of such a law. I further suggested to him, either at that conversation or later, I think it was after he in-
formed me that Mr. Burke had agreed to secure the passage
327 of such a law, that I thought I knew where he could get a
donation, and that if I could be instrumental in the State getting it I would be glad to do so, and at any rate, the law would assist him in his difficult efforts to secure donations. At that time, I do not think I stated to him what the donations would be, bonds or not, or if bonds, the kind of bonds. In fact, the reference to whatever service I might render was incidental. He approved this suggestion and indicated his intention to secure the passage of a law, and discussed it with Mr. Burke, I think, before I made the suggestion that I would be instrumental and try and assist him to secure a donation. If I, at a later period, did discuss North Carolina bonds and lead him to believe that I could be instrumental in secur-

ing a donation of North Carolina State bonds, I would decline to give the information, because I could only have had such information from a consultation and a transaction between attorney and client, and which I understand is privileged.

5. Please state who the client is that you speak of.

The client was Schafer Brothers.

6. Then I understand that that relation existed between Schafer Brothers and you before this donation was made?

It did.

7 Did you appear of record in this case?

I did not.

8. When were you employed by Schafer Brothers?

In January 1901.

9. That was long before this donation was made and before the suit was commenced?

328 It was.

10. Who employed you Senator?

I was employed with Mr. A. G. Ricaud as associate counsel.

11. He was attorney for Schafer Brothers?

He was attorney for Schafer Brothers and all for whom Schafer Brothers acted.

12. Prior to the 1st of January, had you had conversations with Governor Russell, or Mr. Ricaud in reference to the Schafer bonds or any bonds of that class?

Some time in the fall in Mr. Ricaud's office, one day, incidentally the matter was raised by Mr. Ricaud telling me that he represented Schafer Brothers and other second-mortgage bondholders, and about the settlement he had in contemplation which consisted of a memorial to the legislature of North Carolina and trying to secure some compromise or settlement, and we discussed the matter for some time.

13. What was said about the donation of ten of these bonds to South Dakota?

Nothing. To complete the answer to your former question; after that conversation with Mr. Ricaud in the fall, the next time I was in Raleigh and at the office of Governor Russell, the matter was brought up by one of us, I do not remember which, at which time I asked the governor his opinion about the action of the legislature if such a memorial was presented, and I think I asked him what position he would take about it in his message.

14. After the petition was presented to the legislature did you have any conversation with Mr. Ricaud?

329 I was employed by Mr. Ricaud before this petition was presented, or about that time, so my employment covers all of that.

15. After the petition had been presented these ten bonds were given to South Dakota?

Yes, sir; that appears in the record.

16. Did you appear for the State of South Dakota?

I did not.

17. What conversation occurred between you and Mr. Ricaud in regard to these bonds donated to South Dakota?

Any conversation was in the interest of our client, and between associated counsel. I decline to answer on the ground that this is privileged.

18. Was the question discussed as to whether a donation of that kind would not draw into the jurisdiction of the Supreme Court of the United States the remaining bonds held or controlled by Schafer?

I decline to answer for the same reasons.

19. After this conversation with Mr. Ricaud about which you decline to answer, what was done in regard to these bonds?

Whatever was done, was done as a result of the request of client, as result of consultation.

20. After the conversation to which you refer, what occurred between you and Senator Pettigrew in reference to these bonds?

I have already answered, that whatever occurred between us, if anything did, was after my employment, and would have been the result of acting in the interest of my client, and I decline to answer for the same reason.

21. Then I understand you to decline, as a matter of privi-
330 lege, to say what occurred between you and Senator Pettigrew after the conference referred to in reference to the donation to the State of South Dakota of the ten bonds sued upon?

If anything occurred between us, it is privileged, because whatever I may have done was as a result of a consultation with my client and associate counsel, and acting for my client.

Examination by counsel for defendant Salter:

1. You say you have not appeared of record in this case? Please state whether it has not been notorious that you have been counsel for the second-mortgage bondholders, and how long that fact has been known to the public?

(Counsel for the State of North Carolina objects to the question as being irrelevant, immaterial and incompetent.)

I think it was well known. It appeared in the newspapers that I was counsel for the bondholders, in papers in the State and outside of the State a number of times, and I think, soon after my employment. I gave several interviews to the newspaper reporters who questioned me about what they had seen in the newspapers about these bondholders, and about the statement that I was of counsel for them. I did not appear of record for the reason that I was unavoidably absent in the West at the time the answer of my clients was filed. I had conferred with the other counsel when the answer was being prepared but they having made some, more or less
331 material changes since I left for the West, they decided not to take the liberty of signing my name for me.

MARION BUTLER.

The foregoing deposition of Marion Butler was sworn to and subscribed before me at the time and place above mentioned.

A. D. WATTS,
Commissioner.

UNITED STATES OF AMERICA,
City of Washington, District of Columbia.

I, A. D. Watts, duly appointed by agreement and stipulation of counsel, commissioner to take depositions in the above-entitled cause, hereby certify that the above-named witnesses, Charles H. Burke and Marion Butler, were by me first duly sworn to testify the truth, the whole truth and nothing but the truth; that their depositions were reduced to writing by me in the presence of the said witnesses and in the presence of such of the parties and counsel as attended, and when completed were read over to said witnesses and subscribed by them in my presence and in the presence of such of the parties and counsel as attended. That said depositions were taken pursuant to the annexed stipulation at the office of Hon. F. M. Simmons in the Senate Annex building in the city of Washington, District of Columbia, beginning on the 13th day of December, A. D. 1902 and continuing until finished on that date as set forth; that the parties were represented at the taking of the depositions by the
332 respective counsel as set forth; that I am not of counsel or relative of either of the parties or otherwise interested in the event of this suit.

A. D. WATTS,
Commissioner.

(Endorsed:) In the Supreme Court of the United States. The State of South Dakota *vs.* The State of North Carolina, Charles Salter and Simon Rothschilds. No. 11 In equity. October term, 1901. Depositions of Charles H. Burke and Marion Butler taken by A. D. Watts, commissioner, in Washington D. C., Dec. 13, 1902.)

(Endorsed on envelope:) The Supreme Court of the United States. The State of South Dakota complainant, *vs.* The State of North Carolina, Charles Salter and Simon Rothschilds, defendants. Depositions of Charles H. Burke and Marion Butler, witnesses for the defendant, The State of North Carolina in the above-entitled cause, taken before me and by me sealed and transmitted to the clerk of the above-named court. A. D. Watts, commissioner. To the clerk of the Supreme Court of the United States, Washington, D. C. Office Supreme Court of U. S. Received Dec. 16, 1902. Opened in open court by order of court of Dec. 15, 1902, and filed this 16" of Dec. 1902. Jas. H. McKenney, clerk Sup. Ct. U. S.

(Endorsed:) Supreme Court U. S. October term, 1902. Term No. 9, orig'l. The State of South Dakota, compl't, *vs.* The State of North Carolina *et al.* Depositions of Chas. H. Burke and Marion Butler witnesses for the defendants. Filed Dec. 16, 1902.

333 Supreme Court of the United States, October Term, 1902.

THE STATE OF SOUTH DAKOTA, Complainant,
vs.
THE STATE OF NORTH CAROLINA ET AL. } No. 9, Original.

On consideration of the motion to fix a day for the hearing of this cause,

It is now here ordered by the court that this cause be, and the same is hereby, assigned for argument on Monday, April 13th next.

Per MR. CHIEF JUSTICE FULLER.

December 22, 1902.

Endorsed: Supreme Court U. S. No. 9, original. October term 1902. State of South Dakota, v. State of North Carolina *et al.* Order. Filed Dec. 22 1902.

334 Supreme Court of the United States, October Term, 1902.

THE STATE OF SOUTH DAKOTA, Complainant,
vs.
THE STATE OF NORTH CAROLINA ET AL. } No. 9, Original.

Motion for Leave to File Stipulation Concerning Printing of the Record and for Order Directing Clerk to Print in Accordance Therewith.

Now comes The State of South Dakota, complainant, by Wheeler H. Peckham, its solicitor of record, and moves this honorable court for leave to file in this case the stipulation of counsel hereto annexed, and also for the entry of an order directing the clerk of this court to prepare the printed transcript of the record for distribution to the court on the trial of the cause in accordance with the terms of said stipulation.

WHEELER H. PECKHAM,
Per F. D. McK., *Solicitor of Record.*

335 In the Supreme Court of the United States, October Term, 1901. In Equity.

THE STATE OF SOUTH DAKOTA, Complainant,
v.
THE STATE OF NORTH CAROLINA ET AL. } No. 9, Original.

Stipulation as to Printing Record.

It is agreed by all the parties to this suit who have made appearance before this court, to wit, The State of South Dakota, the complainant, The State of North Carolina, the defendant, and Charles Salter, a defendant, that the printed record shall be constituted as follows:

1. The motion for process and bill of complaint.

2. The order of the court directing process to issue against the defendants for their appearance.
3. The answer of the defendant, The State of North Carolina.
4. The answer of the defendant, Charles Salter.
5. The replication of the complainant.
6. The order of the court for the taking of testimony.
7. All stipulations of counsel in their chronological order.
8. The depositions taken before Goodner, commissioner, in South Dakota, except that only one of the bonds and the coupons, together with the endorsement thereon, shall be printed, it being similar in all respects, except as to the serial number, with the others held by the complainant State.

336 9. The depositions taken before Lucas, commissioner, in New York city.

10. The depositions taken before Battle, commissioner, in Raleigh, North Carolina, including all the acts of the General Assembly of North Carolina referred to in the pleadings and in the testimony of the witnesses in this suit or introduced before the said Battle, commissioner.
11. The depositions taken before Watts, commissioner, in Washington, D. C.
12. The order of the court setting the case down for hearing on the 13th of April, 1903.

It is agreed that the clerk shall print only so much of the record as is above mentioned.

This is the 12th day of January, 1903.

WHEELER H. PECKHAM,
Of Counsel for Complainant.
J. C. L. HARRIS,
Of Counsel for the State of South Dakota.
ROBERT D. GILMER,
Attorney General of the State of North Carolina.
D. L. RUSSELL,
Counsel for Defendant Charles Salter.

(Endorsed:) Supreme Court of the United States, October term, 1902. No. 9, original. The State of South Dakota, complainant, *vs.* The State of North Carolina *et al.* Motion for leave to file stipulation and for order concerning printing of the transcript of the record and stipulation as to same. Filed January 19, 1903.

FILE COPY

Supreme Court of the United States

THE STATE OF SOUTH CAROLINA,

Complainant,

vs.

THE STATE OF NORTH CAROLINA,

Defendant.

BRIEF FOR COMPLAINANT

ON FINAL HEARING.

THOMAS H. PEPPER,
S. M. STEVENS,
Of Counsel for Complainant.

Supreme Court of the United States.

THE STATE OF SOUTH DAKOTA *vs.* THE STATE OF NORTH CAROLINA, CHARLES SALTER & SIMON ROTHSCHILD.	**Original** **Brief for Complainant on Final Hearing.**

Statement.

Complainant by leave of Court filed its bill of complaint in this Court on the 18th day of November, 1901.

Process was duly issued and served on each of the defendants.

On the 2nd day of April, 1902, the State of North Carolina and the defendant Charles Salter filed their several answers.

The defendant Rothschild has not answered, but has made default.

A general replication to the answers was filed by complainant on the 28th day of April, 1902.

Under orders of this Court testimony has been taken by complainant and by defendant the State of North Carolina and by defendant Salter.

The bill is filed to foreclose a statutory mortgage enacted by the State of North Carolina on certain thirty thousand shares of the capital stock of the North Carolina Railroad Company of the par value of one hundred dollars each.

The North Carolina Railroad Company was chartered by the State of North Carolina in 1849 with a capital of $3,000,000 divided into thirty thousand shares of $100 each. Of this capital the State subscribed for twenty thousand shares and others for ten thousand shares (Record, Exhibit E, pp. 135 to 149). For provisions for subscription of State, etc., see pp. 145-6, §§ 36 to 43 inclusive.

Later the State, by law, increased the capital stock by ten thousand shares, preferred while held by the State, and subscribed for the same (Record, Ex. F, pp. 149-150).

The total capital stock of the North Carolina Railroad Company thus became and now is four million dollars, divided into forty thousand shares of one hundred dollars each, of which the State owns thirty thousand shares.

In order to pay its subscription for said stock, the State of North Carolina, pursuant to said laws, issued and sold its thirty-year bonds of one thousand dollars each to the aggregate amount of three million dollars, and as collateral security for the payment thereof and pursuant to said laws mortgaged its thirty thousand shares of stock in the North Carolina Railroad Company.

On Feb'y 15, 1855, the State of North Carolina by law incorporated The Western North Carolina Railroad Company (Record, Ex. A, pp. 116 to 127), and in 1860-1 amended the act of incorporation.

The Act of 1855 on the happening of certain events required the Board of Internal Improvements to direct the Treasurer of the State to subscribe for stock in the said Western North Carolina Railroad Company (§§ 8-9 & 10, pp. 119-120).

It was further provided in said act (§§ 35 *et seq.*, pp. 124 *et seq.*), that in order to pay its subscriptions for stock, the State should issue and sell its coupon bonds, pledging its public faith and its stock in

the *Western* North Carolina R. R. Co. for payment of the same.

Under this law, and the amendment thereto of 1860-1, certain of such bonds were issued and sold.

In 1866 a further amendment was made, a copy of which is Exhibit B, p. 127.

This act recited as follows, viz. :

"WHEREAS, by the combined force of said acts the faith of the State of North Carolina was pledged for the payment of four millions of dollars in bonds of the State, a portion of which have already been issued ; and

WHEREAS it is manifestly the interest of the people of the whole State that the residue of the bonds when issued shall command a high price in the market ;"

The act then goes on to provide that whenever it shall become the duty of the Public Treasurer under said acts to issue bonds of the State to the amount of fifty thousand dollars or more, he is authorized and directed to mortgage an equal amount of stock, which the State now holds in the *North* Carolina Railroad as collateral security for the payment of said bonds.

After the passage of the said Act of 1866, the State of North Carolina issued and sold more of said bonds and duly mortgaged its said stock in the *North* Carolina Railroad Company as collateral security therefor.

The complainant, State of South Dakota, now owns and holds ten of said last mentioned bonds. It obtained title to the same by gift of Simon Schaffer (Record, p. 40).

The gift was accepted by the Governor in pursuance of law, and is absolute, without reservation of any kind or character. One of said bonds is shown in the Record between pp. 38 and 39.

There are now outstanding about two hundred

and fifty of such bonds for one thousand dollars each.

By a law of 1879, Ex. C, p. 129, the Governor of North Carolina was authorized to appoint three Commissioners to "adjust and renew a portion of the State Debt."

This act authorized the Commissioners to issue new forty-year bonds and to exchange the same for the bonds issued by the State to aid in the construction of the North Carolina R. R. Co. on such terms as might be agreed upon; or to sell the new bonds and invest proceeds in purchase of the old bonds; the sale and purchase being at the same rate as the exchange.

By another law of 1879, Ex D, p. 131, provision was made "to compromise, commute and settle the State Debt."

It provided for paying in new thirty-year bonds bearing 4% interest, varying percentages of certain classes of existing bonds, (and among others the bonds issued to aid in the construction of the Western North Carolina Railroad) twenty-five per cent. thereof on surrender and cancellation thereof (p. 132, § 4).

It will be noted that by making this exchange holders of old bonds would lose all lien on the North Carolina Company stock, pledged by the State as collateral security therefor. The act, unlike that respecting the North Carolina Railroad Company, contains no provision continuing the pledge of such stock.

This North Carolina Railroad Company stock has now for many years been very valuable. The income therefrom since 1880 has been sufficient to pay the interest on the bonds of the North Carolina Railroad Company, $163,200 per annum, and leave, $16,800 per annum, making in, say twenty years, $336,000, which the State has received, from property pledged to the bondholders, and has used

for its own purposes, while during the same period it has not paid a penny to the holders of the bonds secured thereby.

The State is now receiving dividends on said stock at the rate of $210,000 per annum, which leaves an excess of $46,800 over the payment of interest on the first mortgage bonds, and it refuses to pay that or any amount to the holders of the bonds having a second lien on said stock (Record, pp. 6 and 114).

The present status is that the State is annually collecting from a security pledge to us the sum of $46,800, which is more than three times the amount necessary to pay the interest on the bonds not converted and now outstanding, being about $250,000, (pp. 6 and 18, paragraph 9).

The complainant claims in its bill that the defendant State and its bond creditors secured by first mortgage on the North Carolina R. R. Co. stock had no power to extend the time of payment of such first mortgage bonds and to cut off the right of redemption of the security by the second mortgage bondholders without their consent, which has never been given.

Argument.

First.—This Court has jurisdiction of this case.

The Constitution, Art. 3, provides that the judicial power of the United States shall extend to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States.

This suit comes within the precise terms of the Constitution.

It would seem to be settled law beyond controversy, that where the language used in a constitution or statute is plain, clear and free from am-

bigunity, there is no room or occasion for interpretation, and that the language must be construed according to its plain meaning and intent.

The authorities to this effect are incredibly numerous and in perfect harmony.

One citation is sufficient—Bate Refrigerating Co. *vs. Sulzberger*, 157 U. S., 1.

The principle itself is axiomatic. "*Quoties in verbis nulla est ambiguitas ibi nulla expositio contra verba fienda est.*"

"Nothing," observed Lord DENMAN, C. J., in a recent case, "is more unfortunate than a disturbance of the plain language of the Legislature by an attempt to use equivalent terms."

Everard *vs.* Poppleton, 5 Q. B., 183.
Gadsby *vs.* Barry, 8 Scott, N.R., 804.

"Where the case is within the words of the rule it must be within its operation. Likewise, unless there be something in the literal construction so obviously absurd or mischievous or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making an exception."

The decision in Chisholm *vs.* State of Georgia, 2d Dallas, 419, that the suit would lie was the occasion for the 11th Amendment to the Constitution.

That amendment was, however, limited to the event of a citizen suing a State. It thus became the most conclusive proof that, as to suits between two or more States, or suits by a State against citizens of another State, it was intended that the provisions of the original Constitution should stand.

Curtis on U. S. Courts (2d Ed., Boston, '96), p. 15, says that the language of the Constitution in this regard "requires no particular comment. One State may sue another State in the Supreme Court

under its original jurisdiction either on the question of boundaries or any other question," and as to the effect of the 11th Amendment, on p. 16 says that the "Eleventh Amendment withdraws the State from any liability to be sued by an individual, but it leaves the State to be sued by another State."

A State is also liable to be sued by the United States in this Court.

U. S. *vs.* Texas, 143 U. S., 621.
U. S. *vs.* N. Carolina, 136 U. S., 211.

The latter of these cases was an *action of debt* brought in this Court by the United States against the State of North Carolina on some of the bonds of that State issued and sold to enable that State to subscribe to and pay for the stock in the North Carolina Railroad Company, which or some of which stock is the subject-matter of this suit.

It does not appear in the report of that case how the United States obtained title to the bonds, but although in that case no question seems to have been made, but that this Court had jurisdiction to entertain and decide the controversy, yet in United States *vs.* Texas, 143 U. S., p. 642, Mr. Justice HARLAN says that "it is true that" in U. S. *vs.* North Carolina "no question was made as to the jurisdiction of this Court and nothing was therefore said in the opinion upon that subject. But it did not escape the attention of the Court and the judgment would not have been rendered except upon the theory that this Court has original jurisdiction of a suit by the United States against a State."

The United States also may be sued by a State in this Court pursuant to a statute (Minnesota *vs.* Hitchcock, 185 U. S., 373).

The opinion of MARSHALL, Ch. J., is most clearly

and forcibly expressed in Cohen *vs.* Virginia, 6 Wheaton, 406–7, as follows:

"It is a part of our history, that, at the adoption of the Constitution, all the States were greatly *indebted*; and the apprehension that these *debts* might be prosecuted in the Federal Courts, formed a very serious objection to that instrument. Suits were instituted; and the Court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State legislatures. That its motive was not to maintain the *sovereignty of a* State from the *degradation* supposed to attend a *compulsory* appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not *comprehend controversies* between two or more States, or between a State and a foreign state. The jurisdiction of the Court still extends to these cases; and in these a State may still be sued. We must ascribe the amendment, then, to some other cause than the *dignity* of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not *much reason to fear* that foreign or sister States would be *creditors* to any *considerable* amount, and there was reason to retain the jurisdiction of the Court in those cases, because it might be essential to the *preservation* of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but *not to those brought by States.*"

On p. 378, he said in the same case:

"In the second class, the jurisdiction depends entirely on the character of the parties. In this

are comprehended '*controversies* between *two or more* States, between a State and citizens of another State, and between a State and foreign states, citizens, or subjects'. If *these be the parties*, it is *entirely unimportant what may be the subject of controversy*. *Be it what it may*, these parties have a constitutional right to come into the courts of the Union."

4. The ground of the jurisdiction is that the States have by adopting the constitution *agreed* to submit controversies between themselves to the determination of this Court.

Rhode Island *v.* Massachusetts, 12 Pet., 720.

And, in this agreement, no exception was made of any possible case which might arise. The settlement of claims by diplomacy or by war was taken away by the constitution, and it was necessary to make some provision to take their place. Such provision was made by the organization of this Court and giving it this jurisdiction.

5. Indeed, it is most just that the jurisdiction should be exercised where the plaintiff's claim is for the collection of debt.

Mr. Justice FIELD says: "When a State enters into the markets of the world as a borrower, she for a time lays aside her sovereignty and becomes responsible as a civil corporation."

Louisiana *v.* Jumel, 107 U. S., 740.

And this Court said further, in another case: "The truth is, States and cities, when they borrow money and contract to pay it with interest, are not *acting as sovereignties*. They come down to the level of *ordinary individuals*. Their contracts have the same meaning as that of similar contracts between private persons. Hence, instead of there

being in the undertaking of a State or city to pay, a reservation of a *sovereign right to withhold* payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity."

Murray *v.* Charleston, 96 U. S., 445.

While in New Hampshire *vs.* Louisiana and New York *vs.* Louisiana, 108 U. S., 76, a limitation was put upon the right of a State to sue another State to the effect that the State must have the beneficial as well as the mere legal interest in the cause of action and cannot maintain the action for the benefit of its citizens, and in Louisiana *vs.* Jumel, 107 U. S., 712, that mandamus to execute the duties imposed by law and constitution upon a State officer will not go if the State by a law or amendment to its constitution has forbidden such action, notwithstanding that such law or amendment impairs the obligation of contracts and is therefore void; yet in Missouri *vs.* Illinois, 180 U. S, 208, it was held that the State of Missouri might maintain a bill in equity in this Court to enjoin the State of Illinois and a public corporation thereof, called the Sanitary District of Chicago, from polluting the waters of the Mississippi river.

Many questions are at once suggested in contrasting the cases of New Hampshire *vs.* Louisiana and Missouri *vs.* Illinois.

In the latter case the State of Missouri had no direct interest in the question and she had an indirect interest only as representing *certain* of her citizens who lived near enough to the river to be affected by the alleged wrongs.

In the earlier case New Hampshire had the legal title to the bond sued on, but the assignors, her citizens, were the beneficial owners, and the case

was held to be within the spirit of the 11th amendment, notwithstanding that there can be no doubt but that had New Hampshire and Louisiana been completely independent States New Hampshire would have had the right in behalf of her citizens to assert their claims against Louisiana by way of diplomacy or force.

Such right is of precisely the same character as that which Missouri, in behalf of her citizens, could have asserted against Illinois had they been completely independent States.

Throughout all the controversies in this Court suggestions have been made to the effect that certain controversies were not justiciable in their nature; were political in their character and as between independent nations would fall to the political department of each to decide, and the decision of the political department of each would be conclusive on its Courts.

That it cannot be supposed to have been intended to bring such cases within the jurisdiction of the Courts.

So far as we have been able to find there is no case holding that an action for debt is of such political character and will not lie in favor of or against a State, while there are many cases which were unquestionably of a political nature, *e. g.*, boundaries, where the jurisdiction has been maintained. Indeed, in U. S. *vs.* N. Carolina, 136 U. S., the action was debt, and as we have seen the jurisdiction was maintained.

Second.—Defendant State by its answer says that it denies that there was or is within the meaning of the Constitution any controversy between the complainant and the defendant State (p. 21, para. XV).

Defendant would seem thereby to intimate that

some sort of prior discussion and negotiation, diplomatic or otherwise, must have taken place, resulting in a "controversy", before jurisdiction can attach in this Court. No such position can be well founded. Between citizens of differen Sttates a "controversy" to give jurisdiction arises when one has a cause of action against the other. The commencement of the suit may have been the first knowledge by the obligor of the existence of the obligee: but no one ever heard of a plea by the obligor that, because of that, there was no "controversy" between them, and that, therefore, the United States Courts had no jurisdiction.

No reason can be suggested why the case to which a State is a party, of which this Court has original jurisdiction, should be founded on a "controversy" of any different character from the "controversy" between individuals.

Suppose a suit brought by a State against an individual on a promissory note. Can it be supposed that, in order to give jurisdiction to this Court, any "controversy" is essential before suit brought other than such as is necessary to maintain any action in an other Court? Clearly not.

A controversy exists when a suit, if the controversy be justiciable, can be maintained. In no case of debt assumpsit or like action is a prior demand necessary. The commencement of the suit is a sufficient demand, and where the right to maintain the suit exists the "controversy" exists.

That there is a controversy in this case the answer of the defendant State sufficiently proves.

Third.—The complainant State is competent to become the owner and holder of the obligations of the defendant State.

In Texas *v.* White, 7 Wallace, 700, the State of Texas sued in this Court as the owner of certain

bonds of the United States to enjoin their payment to others than the State of Texas. Jurisdiction was maintained and the injunction granted.

It is incident to the sovereign power both to draw and purchase bills.

U. S. *vs.* Bank, 12 Peters, 377.

Also to become a donee, whether by legacy or otherwise.

Matter of Meriam, 141 N. Y., 479-484.
Estate of Cullom, 5 Miscellaneous Rep., 173; affd. 145 N. Y., 593.
See also U. S. *vs.* Fox, 94 U. S., 315.

It would be strange indeed if with all the rights that are claimed for "sovereign" States they did not have the right to accept a gift.

Nor does Sub. 1, Section 10, Article 2 of the Constitution, which forbids a State to enter into any agreement or compact with another State, affect the right of the complainant to hold these bonds.

The compacts or agreements intended are those of a political nature, such as could be made between sovereigns only. It does not forbid ordinary business agreements, such as could be transacted between individuals, least of all was it intended to forbid the purchase and ownership by one State in the open market of the securities of another.

Union Branch R. R. Co. *vs.* East Tennessee & Geo. R. R., 14 Georgia Rep., 327.
2nd Story Com., §§ 1354-5, 1401, 2, 3.

A promise to pay money is not an agreement of the character intended to be prohibited.

In the beginning of its existence, this Court, by Mr. Justice WILSON, said: "A State, like a merchant, makes a contract. A dishonest State, like

a dishonest merchant, wilfully refuses to discharge it. The latter is amenable to a court of justice upon general principles of right. Shall the former, when summoned to answer the fair demands of its creditors, be permitted, Proteus-like, to assume a new appearance and to insult him and justice by declaring, I am a sovereign State? Surely not."

4 Dallas, p. 456.

In these present years this Court speaks the same language: "The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. *Their contracts have the same meaning as that of contracts between private persons.*"

96 U. S. Rep., 445.

Mr. Chief Justice Taney, in Holmes *vs.* Jennison (14 Peters, 572), following Vattel, gives to the words "compact and agreement" a meaning differing in degree, but not in kind, from the word treaty; and Mr. Justice Story says, in arriving at the same result, that the maxim "*noscitur a sociis*" applies.

2d Story on Const., §§ 1402-3.

It would seem clear that to the case of negotiable bonds issued by a State to individuals, this constitutional clause has no application.

The compact or agreement made in these bonds, so far as the State is concerned, is made with the individuals who take the bonds. One of the features of that contract, given to it by the commercial law, is that it is assignable, and that the assignee takes not only an equitable, but a legal title, and can sue in his own name.

The two States make no contract—an individual assigns to one State a contract he has made with another.

To say that a State could not thus become the assignee of a contract would be going much further than in the illustration put in 14 Georgia, 329, that a State could surely sell to another State a locomotive or other personal property having no political characteristics, without consulting Congress. Suppose a State, a creditor of one of its own citizens, who had bonds of another State, and nothing else, and the bonds unsalable because of threatened repudiation; can there be any doubt of the right of the State to take the bonds in payment, or on account, of the claim? Surely not.

If, then, complainant can become the owner and holder of these bonds, surely it is entitled to the same remedies in this Court to which an individual owner would be entitled, in the Circuit Court, against an individual debtor.

Fourth.—There is nothing in the answer or proofs respecting the gift in controversy in this suit to affect the jurisdiction or the relief.

The most that is claimed is that the donor of the bonds, one Schafer, gave them to the State of South Dakota in the hope and expectation, that the State would bring suit on them in this Court.

The gift was absolute. No possible interest or estate in the bonds was retained in or by the donor.

What is attacked in this case is not as in the Louisiana cases in 107 & 108 U. S., but *the motive*, and the motive of the *donor*. The claim nakedly expressed is that the motive of the *donor* was bad.

The late Mr. Justice CURTIS, in an article published in the *North American Review* for January, 1844, and in his life by his son, B. R. Curtis, of

Boston, Vol. 2d, pp. 93 *et seq.*, said: "Under the common law the King might take an assignment of a debt and sue therefor in his own name. And we have no doubt that the same law exists in all countries.

It seems to follow then that if the sovereign should take an assignment of a claim and sue therefor in the court of a foreign country, the comity and respect due to the foreign sovereign would necessarily prevent the Court from enquiring into the causes and motives of the assignment, especially in a country where the common law exists which makes all debts negotiable between the sovereign and a subject or citizen."

In this case it is impossible to impute to the complainant any improper motive, any more than if the gift had been by a legacy rather than by gift *inter vivos*.

But motive, even in a complainant, is immaterial. The only question is, has the complainant a right? Whether acquired with good, bad or indifferent motives is quite immaterial.

Morris *vs.* Tuthill, 72 N. Y., 575.
Rice *vs.* Rockefeller, 134 N. Y., 174.
Ramsey *vs.* Gould, 57 Barb., 398.
2 Morawetz on Corporations, § 259, and cases cited.
Pender *vs.* Lushington, L. R., 6 Ch. Div., 75–76.
Phelps *vs.* Nowlen, 72 N. Y., 39.

Where, as in the present case, the State owns the whole interest, legal and beneficial, in the bonds sued on, which interest it was empowered to acquire and did acquire by virtue of the act of the Legislature, by a donation from individuals, it makes no difference that the motive of the donor was the hope that the State would bring suit on the bonds.

The question is, is it a real gift, the donor retaining no interest in the thing given? If it be, as in this case it unquestionably is, this Court has repeatedly held that motive is not material.

In McDonald *vs.* Smith, 1 Peters, 620, on p. 624, MARSHALL, Ch. J., says: "The motives which induced him to make the contract, whether justifiable or censurable, can have no influence on its validity. They were such as had a sufficient influence with himself, and he had a right to act upon them. A Court cannot enter into them while deciding upon its jurisdiction. The conveyance appears to be a real transaction, and the real as well as nominal parties to the suit are citizens of different States."

In Barney *vs.* Baltimore City, 6 Wallace, 280, the head note reads, "Although the simple fact that a transfer or conveyance of the subject of controversy is made *for the purpose* of vesting an interest in parties competent to litigate in the Federal Courts does not defeat the jurisdiction, if the transaction vests the real interest in the grantee or assignee—yet if the conveyance or assignment is colorable only and the real interest remains in the grantor or assignor the Court cannot entertain jurisdiction of the case." Says MILLER, J., on page 288: "If the conveyance * * * has really transferred the interest * * *, although made for the avowed purpose of enabling the Court to entertain jurisdiction of the case, it would have accomplished that purpose."

See also

Smith *v.* Kernochan, 7 Howard, 198.

In Dickerman *v.* Northern Trust Co., 176 U. S., 181, the mortgage securing the bonds provided that the bonds should become due if execution should

be issued against the mortgagor company and be not paid.

A suit by a bondholder on six coupons before a Justice of the Peace, appearance by defendant and consenting to judgment and execution, all done to enable the trustees to declare the bonds to be due and bill to foreclose thereupon filed were held insufficient as a defense.

On page 190 the Court said: "If the law concerned itself with the motives of parties new complications would be introduced into suits which might seriously obscure their real merits.

If the debt secured by a mortgage be justly dues it is no defense to a foreclosure that the mortgagee was animated by hostility or other bad motive" (citing many cases).

In Toler *vs.* R. R. Co., 67 Fed. Rep., p. 177, opinion by LURTON, J., it was said, "Whether complainants are conducting this suit from good or bad motives for their own benefit or for the benefit of another is immaterial." It is no defense to a legal demand instituted in the mode and according to the practice of this Court that the complainant is actuated by personal or improper motives." (citing many cases). * * * Were it otherwise, *nearly every suit would degenerate into a wrangle over motives and feelings.*"

Fifth.—The assignment of the bonds of the defendant State to the complainant State carried with it the mortgage of the railroad stock created by the Legislature of the defendant State to secure the bonds.

While authority for this is not needed we cite

Converse *vs.* Michigan Dairy Co., 45 Fed. R., 18.

In this case the company had executed a mort-

gage upon its lands to one Clay to secure fifty-six notes at $1,000 each, and these notes were endorsed and delivered to the plaintiff to secure a loan of $20,000. Severns, J., said that the endorsement and delivery operated as an assignment of the mortgage and transferred to the holder of the notes the same equitable rights in the mortgage which he had in the notes.

Cooper *v.* Ulmann, Walk. Ch., 251.
Briggs *v.* Hannowald, 35 Mich., 474.
Carpenter *v.* Longan, 16 Wall., 271.
Kennicott *v.* Supervisors, 16 Wall., 452.
Ober *v.* Gallagher, 93 U. S., 199.

It will be observed that in these cases only a portion of the notes or bonds were acquired by the complainant seeking to foreclose, and it was held that the transfer to complainant enabled the complainant to carry on the proceeding of foreclosure, because an assignment of a part of the debt, or of one or several bonds or notes, secured by the mortgage carries with it a *proportional* interest in the mortgage.

Sixth.—It appears from the bill, and Exhibit B thereto, that the defendant State made a statutory mortgage to secure the bonds sued on, and the whole issue, in the following language: "The "public treasurer is hereby authorizedand directed, "whenever it shall become his duty under the "provision of said acts, to *issue bonds* of the State "to the amount of fifty thousand dollars or more "*to mortgage an equal amount of stock which* "*the State now holds in the North Carolina* "*Railroad, as collateral security for the payment* "*of said bonds*, and to execute and deliver, with "each several bond, a deed of mortgage for an

"equal amount of stock of said North Carolina "Railroad, said mortgage to be signed by the "treasurer and countersigned by the comptroller, "to constitute a part of said bond, and to be "transferable in like manner with it, as provided "in the charter of said Western North Carolina "Railroad Company; and further, that such "mortgage shall have all the force and effect, in "law and equity, of actual mortgages without "actual registry."

It appears that the defendant State was owner of 30,000 shares of stock in the North Carolina Railroad Company, of the par value of $3,000,000; shares $100 par.

It will be observed that the Treasurer was directed to mortgage an amount of stock *equal to the bond issue*, and that a *proportional* amount of stock was to be made collateral security for the payment of each bond; that is to say, a number of shares of $100 each was to be collateral to each bond, and a number of shares at that figure was to make a sum equal to the par of the bond, and upon the bond there was endorsed a statement to that effect.

This mortgage, in equity, stands as security for all the bonds, and the said bonds, being sold to different persons, the mortgage still stands for all the bonds, *pro rata*.

Such is the general rule with regard to mortgages securing a large number of bonds, and there is nothing in the language of the act of the defendant State showing an intention to *vary the general* rule on the subject. Vast numbers of bonds secured by mortgage have been in use in this country, and nothing is to be observed in the terms of the North Carolina act to indicate any purpose *to vary* the *general* rule. No *specific* shares of stock are attached to any particular bond. The language "ten

shares of the stock" plainly indicates *simply that proportion* out of the whole number of shares of stock mortgaged. The shares of stock mortgaged were an amount equal to the *number of bonds* issued. That is the contract in substance; the actual words are, "When the Treasurer shall issue bonds of the State to the amount of $50,000 or more"—by law he could not issue less than $50,000 at a time—"he shall mortgage an *equal amount of stock* as collateral security for *the payment of said bonds*." Plainly, the *whole amount* of shares of stock becomes security for the whole *amount* of the bonds.

The general rule in equity is stated in 3 White and Tudor's Leading Cases in Equity, 3rd Am. Ed., Wallace's notes to the cases of Row *v.* Dawson and Ryall *v.* Rowles. It is there stated, on p. 646, that where there are different obligations secured by the same mortgage, the mortgage creates a *trust* for the *payment* of all *the obligations*, under which each bondholder had equal claims, and that the question is one of *contract* or *intention* (p. 647).

On p. 369, same vol., is stated the general doctrine given above, that the mortgage is simply security for the debt, and that whatever transfers the debt carries with it the mortgage.

The Supreme Court of Michigan say, in

English *v.* Carney, 25 Mich., 178, 181 (bottom),

that it is settled, in accordance with the weight of authority, that a mortgage given to *secure several obligations* stands as *security for the whole*, and that, if a mortgagee assigns one of the obligations to a third person, the mortgage in equity would stand as security for all the obligations, as well for the one assigned as those retained.

It is further said, at the top of page 182, that

when all the bonds are sold and transferred, each to a different person, the mortgage will stand as an *equal security* for all the obligations, *pro rata*.

The United States Circuit Court of Appeals, 6th Circuit, in

Kortlander *v.* Elston, 52 Fed. R., 180, 183 (bottom),

recognizes the doctrine laid down in the case of English *v.* Carney, and says that in that case it was held on foreclosure that the proceeds of sale must be applied *pro rata* to all the notes, because a *pro rata* application of the security to all the notes was fixed by the original *contract* of the mortgage.

It appears that the defendant State at the time of making the mortgage was the owner of 30,000 shares of stock, of the par value of $3,000,000, and that the mortgage was of such an *amount of stock* as should *equal at par the par* of bonds to be issued in aid of the Western North Carolina Railroad. It also appears that at the time of this mortgage the State's 30,000 shares was subject to a first mortgage to secure 6% thirty-year bonds for $3,000,000, which are known as "first mortgage bonds", so that the bond issue, some of which is owned by the plaintiff State, is secured by a *second* mortgage upon the stock aforesaid.

Indeed, when we consider the nature of a share of the capital stock of a corporation it is apparent that the rule could not be otherwise.

"Each share represents a distinct interest in the whole of the corporate property" (Matter Bronson, 150 N. Y., p. 20; Jermain *vs.* L. S. Ry. Co., 91 N. Y., 483, *492*).

"The stock owned by the plaintiff made him the equitable owner of an undivided fractional part of the entire assets of the Company."

Flynn *v.* Brooklyn City R. R. Co., 158 N. Y., 504.

"The right which a shareholder in a corporation has by reason of his ownership of shares is a right to participate according to the amount of his stock in the surplus profits of the corporation on a division and ultimately on its dissolution in the assets remaining after payment of its debts."

Matter of Fitch, 160 N. Y., 94.
See also 1 Morawetz on Corporations, §§ 234-237.

The State of North Carolina did not own and did not mortgage thirty thousand several and divided shares of the stock of the North Carolina Railroad Company, leaving ten thousand other and divided shares to be owned by others; but the State of North Carolina owned and mortgaged an *un*divided $\frac{30000}{40000}$ or $\frac{3}{4}$ of all the assets of the North Carolina Railroad Company.

A divided share of stock in a corporation is unthinkable. A share is an undivided interest and can be sold, mortgaged or described only as an undivided right or interest.

Seventh.—The first mortgage bonds alluded to under the last head matured in 1879, some *years subsequent* to the issue of the second mortgage bonds, and, of course, the second mortgage bondholders had a right to redeem the first mortgage.

Under those circumstances, the defendant State, in 1879, passed an act to renew the first mortgage bonds by the issue, of a forty year bond at not to exceed 6%, to stand in the place of the original first mortgage bonds; it being provided that the new bonds were not an extinguishment of the old bonds, but a *renewal* and *extension* of the same, and without prejudice to the old bonds. It further appears that, nevertheless, the old bonds were surrendered by

their holders and delivered up to the State, and were destroyed and cancelled; so that the forty-year bonds were in fact new bonds; so that there was a surrender and cancellation of the whole issue of the old bonds by their holders and an acceptance by them of new bonds for a different amount, as more fully appears by Exhibit C, attached to the bill.

Eighth—The holders of the second mortgage bonds were not *parties to* and did *not* consent to the alleged extension of the first mortgage bonds, and if the first mortgage bonds were not actually extinguished, but were, as is claimed by the holders and by the defendant State, *simply extended* as respects the time of their maturity, then the extension as respects the holders of the second mortgage bonds was ineffective. The maturity of the first mortgage could not be postponed without the consent of the second mortgagees, who possessed a vested right to pay off and discharge the first mortgage, at maturity, according to its terms. But if the first mortgage bonds were not extended, but were actually extinguished, then the second mortgage, held by the plaintiff State and the other holders of the same issue of bonds, is a first mortgage.

Mr. Justice CAMPBELL, of Michigan, said: "That a second mortgagee has an absolute right, at any time after the coming due, of a prior incumbrance, to redeem it and be subrogated to it", and further said "that the right of a second mortgagee to redeem a prior mortgage cannot be CUT OFF or PREJUDICED by ARRANGEMENTS BETWEEN the holder of the first mortgage and the mortgagor for an EXTENSION of time to pay it."

Sager *v.* Tupper, 35 Mich., 134.

In Iowa, it was said: "that the right of a second mortgagee to redeem, after the maturity of the prior mortgage, is not affected by the fact that the time of the payment of the debt secured by the first mortgage had been extended, if the junior mortgagee had no notice of the extension (before taking his mortgage.)"

Wheeler *v.* Menold, 81 Ia., 647.

Ninth.—In either aspect of the case, the first and second mortgage bondholders, upon the general principles of equity, being interested in the funds, must be made parties to this suit.

The rule in equity upon the subject is that all persons who have an interest in a suit must be made parties, and it is also a familiar rule that when it is impracticable to bring before the Court all interested, it is sufficient to make such persons parties as have a common interest with those who are absent. In such a case, the parties who are present in the suit represent the rights of those who are absent, and the Court proceeds to make its decree binding the rights of the absent parties.

Story Eq. Pl., 97, 112.
Florida *v.* Georgia, 17 How., 510.

The language of the latter case is by Mr. Justice Curtis, in a dissenting opinion, but not dissenting upon this point.

Upon this rule, the first mortgage bondholders are represented as a class by the defendant Simon Rothschild, a citizen of New York, and the second mortgage bondholders, holding bonds of the issue of which the plaintiff State holds its bonds, are represented by the defendant Charles Salter, also a citizen of the State of New York.

There is no doubt of the proposition that there is jurisdiction between the plaintiff State and two citizens of another State, viz.: the State of New York; just as there is jurisdiction between the plaintiff State and the defendant State of North Carolina; and no objection is perceived to joining the defendant State with two citizens of another State as defendants.

In a recent case, it was held that there was no jurisdiction in this Court in an original suit between a State and citizens of the *same* State, but it was not denied that there was jurisdiction between a State on *one side and citizens* of another State upon the other side; and in the case it was ruled that the Court would not proceed in the absence of citizens of the same State as the plaintiff State, which citizens are indispensable parties, according to the principles of equity. Those parties, it appeared, could not be joined without ousting the jurisdiction, and, consequently, the bill was dismissed.

California *v.* So. Pac. R. R., 157 U. S., 229.

Minnesota *vs.* Northern Securities Co., 184 U. S., 199.

Washington State *vs.* Northern Securities Co., 185 U. S., 255.

This bill makes the senior mortgagees parties, because it seeks the sale of the stock *free from encumbrance;* and it is, *in effect, a bill to foreclose the second mortgage and to redeem from the first.*

It results from the foregoing, that the plaintiff State, bringing all persons in interest before the Court, and both mortgages being overdue, and all bondholders being proportionately interested, is entitled under the rules of equity to press a sale of

the mortgaged property; for the purpose of collecting its own debt.

While in a bill to foreclose a second mortgage it is not required that the first mortgagee be made defendant, yet, when the decree sought is subject to the mortgage of the first mortgagee, and his mortgage is due, he may be made a party; and if, as in the present case, it is asked that the property be ordered to be sold free of encumbrances, the first mortgagee must be made a party, and the bill in such a case is in effect both a bill to foreclose the second mortgage and a bill to redeem from the first mortgage.

GRAY, J., in Heffner *v.* N. W. Life Ins. Co., 123 U. S., 747, *754 top*, and *cases cited*.

See also

Jerome *v.* McCarter, 94 U. S., 734.
Sutherland *v.* L. S. Co., 1 Cent. L. Jour., 127.
McClure *v.* Adams, 76 Fed., 899.

It is proper, in a suit of this kind, to seek to determine the priority of the former mortgage; that is to say, to determine whether it is extinguished, or whether the extension of it was legal, if it was extended.

See

Murdock *v.* Woodson, 2 Dillon, 188.
Board *v.* Min. Pt. R. R., 24 Wis., 93.
Campbell *v.* Texas R. R., 2 Woods, 263.

It may further be said that the certificate upon the bond, with regard to security for 10 shares, being no part of the statute, cannot affect the construction of the statute; and, as to the construction of the statute, the rule is that what is implied in it is as much a part of it as what is expressed.

That is, the intention of the maker of the statute being as much within the statute as it is within the letter, the Court has to ascertain the meaning; which was to mortgage all the stock to secure all the bonds, each proportionately.

U. S. *v.* Babbitt, 1 Black (U. S.), 61.
County of Watson *v.* Natl. Bank, 103 U. S., 770.

It is desirable to consider what litigation has been had concerning the legislation of North Carolina in this regard, particularly the "*Swasey*" Litigation.

1. The North Carolina Railroad Company was incorporated in 1849 to build a railroad from the Wilmington & Raleigh Railroad to Charlotte, and the State Board of Improvement was authorized to subscribe, on behalf of the State, $2,000,000 of the capital stock of the railroad company, and it was provided by Section 38 of the act that if it should become necessary to borrow the money authorized by the act the Public Treasurer should issue certificates in sums not less than $1,000 each, pledging the State for the payment of the sum with interest at 6%, the certificates to be redeemable at the end of thirty years, and that the public faith of the State was pledged to holders of the certificates; and, in addition thereto, *all the stock* held by the State of North Carolina should be and was pledged for that purpose, as also the dividends and profits; and it was made the duty of the Treasurer to pay interest out of any moneys in the treasury.

Under this legislation certificates were issued to the amount of $1,858,000, on which the money was borrowed.

February 14, 1855, another act was passed for the completion of the North Carolina Railroad, and the Public Treasurer was authorized to subscribe $1,-

1,000,000 more to the capital stock, and to make payment therefor by selling bonds of the State under the same restrictions as above, and the same securities were given for the payment and redemption of the certificates.

Mr. *Swasey* owned five certificates of the first issue and two of the second, and prosecuted his action for the benefit of all bondholders who might come, and about $1,800,000 indebtedness is represented in the suit. When the action was commenced no certificate of stock upon their subscriptions had been issued by the company, but upon the order of the Court in the suit, the *proper certificates were* issued and put in the hands of a Receiver who was appointed in the case and who collected the dividends, and these dividends were applied to the payment of interest. A large amount of interest being in arrears, Swasey asked by his suit that a sufficient amount of the stock might be sold to pay what was past due. The objection was made by the North Carolina Railroad Company that the State was not a party to the suit and was a necessary party. It was held by Waite, C. J., holding the Circuit Court, that the case was ruled by Osborn *v.* U. S. Bank, 9 Wheat., 738, authorizing jurisdiction of cases affecting the property of the State in the hands of its agents without making the State a party, and the question presented was, therefore, whether the property which was sought to be charged in the suit was within the jurisdiction of the Court, and whether the agent of the State having that property in possession was within the jurisdiction of the Court. The property of the State, the Chief Justice held, consisted of *shares* in the *capital stock*, which was charged as *security for the payment* of the *debt of the State*. The company was the depository of the pledged stock, to hold for both parties, according to their interest; consequently, a suit seeking to charge *the stock* as

security, and bringing in *the corporation*, it was held might be maintained in the *absence* of the State as a party.

It was further said that a lien was given upon the stock as security, and that it was the *understanding* that *the State should* permit the *bondholders* to use *the courts* to subject *this portion* of the security to the payment *of the* debt. And it was further held that the security was for the interest as well as for the principal. Consequently the Court held that Mr. Swasey, and those whom he represented, were entitled to have *their proportion of* the stock, or so much as might *be necessary, sold in* order to pay the interest past due upon the bonds. And the Court further held that the security was divisible, and should be apportioned to the various bondholders according to the amount of their respective claims, and that each bondholder should have an *amount of* stock which bears the *same proportion* to the whole stock that *his bonds* do to the *whole* amount outstanding.

It was further held that the Court would not order a sale of the stock until time had been given to the State to provide by levy and collection of taxes the necessary funds for paying the interest.

Swasey *v.* North Carolina, 1 Hughes (U. S.), 17.

An appeal was taken from this decree to this Court, where there was a motion to dismiss because the decree below was not a final decree. The case is stated in the report a little differently from the above, and it is said that the State received the dividends upon the stock and *appropriated the money to purposes other than* the payment of interest, and the interest not being paid Swasey filed his bill, praying (1) to restrain the treasurer of the railroad company from paying any *more* dividends to the State ; (2) to restrain the State Treasurer

from *receiving* any more dividends, and (3) for the appointment of *a receiver*. It is further stated that upon argument before the Circuit Judge the injunction was *awarded as prayed*, that a receiver was appointed, and that the *Receiver collected* several dividends from the railroad company and distributed those dividends under the orders of the court, but it becoming evident that the arrears could not be paid without *selling* the stock the court decreed that the stock should *be* sold, reciting that by the terms of the charter of the railroad company *all the shares and dividends* were pledged as security *for the payment* of the certificates, and that the plaintiff and those he represents were entitled to have their respective *proportions* of the stock, or so much thereof as might be necessary, sold to pay the *past due* interest; and the receiver was ordered to take an account of the unpaid interest and of such proportion of the stock of the State in the railroad company as might be equitably applicable to the payment of the interest found due to each of the stockholders.

This Court said that the lower court had done no more than to declare that the certificate holders had a lien upon their equitable portion of the stock, which lien was *enforceable* by sale, and had ordered an account stated of the indebtedness to the certificate holders in the suit of their proportion of the stock pledged by the State; and the Court said that inasmuch as the order below was only interlocutory the appeal could not be sustained.

R. R. Co. *v.* Swasey, 23 Wall. (U. S.), 405.

These two cases hold, in regard to legislation similar if not identical with the legislation considered in the case at bar, that all the stock *was* security *for each* certificate, and the court would ascertain *the*

amount of stock *equitably* applicable to each certificate.

2. In a subsequent case, *this Court* disapproved the holding of the Chief Justice at the circuit in *some respects*, and said that the purpose of the Swasey suit was to obtain an adjudication of the lien upon the stock held by the State in the railroad company, and upon the dividends of the stock, and the enforcement of the lien by requiring dividends to be paid to bondholders, and by a *sale* of the stock itself if necessary, and by the appointment of a receiver to take possession of the dividends, and by an injunction to restrain the company from applying the dividends to any other purpose than payment to the bondholders.

This Court goes on to say that dividends due to the State could not be seized and appropriated to the payment of bonds, and that the stock owned by the State could not be sold by means of a suit in equity without *making the State* a party. The Court said that the ground upon which it was claimed that this might be done was that the property is affected by the pledge, and might, therefore, be dealt with *in rem*. The Court, however, said that it could not be dealt with *in rem* without the presence in the suit of the *party creating* the pledge, if a pledge was created, and said that the proceeding was really a suit *against the party* making the mortgage to obtain by decree the benefit of the mortgage right, and that where the mortgagor in possession is a sovereign State the proceeding could not be obtained at the suit of an individual.

This Court further said that the views of the Chief Justice on circuit seemed to have been based on the idea that the stock of the State was lodged in the agents of the railroad company, as trustee for the parties concerned, and was *not in the hands*

of the State itself or of its immediate officers and agents; and further said that the State is an *indispensable* party to any proceeding in equity in which its property is sought to be taken and subjected to the payment of its obligations.

Christian *v.* Atl. & Nor. Car. R. R., 133 U. S., 233.

3. In another case, where there was a foreclosure of a mortgage, a party claiming to be the owner of the majority of the bonds secured applied to be made defendant for the purpose of resisting foreclosure; and it was said that he ought to be allowed to *intervene* to protect his interest, it appearing that the mortgage was of railroad stock for the *equal, pro rata* benefit of all holders of the bonds secured thereby. It was further said that it was not *necessary* before decree that the bonds and coupons should be *produced*, or that each claimant of a bond or unpaid interest should identify himself as an owner before decree. It was further said that *motives* of complainants in conducting the suit could not be inquired into, because it would be no *defense to a legal demand that* the complainant is actuated by personal or improper motives.

In this mortgage it was *recited* that the purpose for which it was made was "for the *equal pro rata benefit of all the* holders of the bonds *secured* thereby, without any preference or priority of one bond over another." And it was accordingly held that the distribution should be *pro rata* of all the bonds, principal and interest, and that each beneficiary would be entitled to a *ratable proportion* of the value of the whole property, to be ascertained by *public* sale.

Toler *v.* East Tenn. R. R. Co., 67 Fed., 168.

In another case there was an issue of bonds secured by a first mortgage, to take up those of a prior issue, but the new issue was larger than was necessary. A suit was brought by the bondholders of the second mortgage to foreclose, and it was held that the surplus bonds above mentioned, whether actually issued or not when the second mortgage went into effect, were secured by the first mortgage equally with the bonds which were not a part of the surplus, and that the first mortgage bonds remaining unissued could be issued by the company after the date of the second mortgage so as to carry a lien under the first mortgage.

Claflin *v.* S. C. R. R., 8 Fed., 118; Waite, C. J.

In another case, where, by the charter of a bank, stockholders were held responsible for the debts of the bank in *proportion* to their stock, it was said that there being numerous creditors one creditor could not proceed to appropriate to himself the entire benefit of the security to the exclusion of other creditors, but should proceed in equity to have an accounting of the debts and stock and a *pro rata* distribution among the stockholders. This was said to be the *intention* of the State, viz., that a distribution *pro rata* should be made; that the *common fund* was created for the common benefit, to be collected and distributed by the receiver as the common agent of all.

Pollard *v.* Bailey, 21 Wall., 520.

In another case it was decided that if by the terms of the contract the whole property covered by the mortgage to secure an issue of bonds is pledged to each bondholder, then the *contract is clearly* that each bondholder shall receive the *pro rata* share of the whole security which his bond

bears to the whole series; and it was said that where a mortgage secures the whole number of bonds, in a distribution of the proceeds of sale, each bond carries only a fractional interest in the proceeds, which interest is to be ascertained by the proportion which its amount bears to the whole amount secured.

Barry *v.* M. K. & T. Ry., 34 Fed., 829.

In such cases, equities adjudged against parties served with process are binding upon all *persons of the same* class, although absent from the litigation, because of the vicarious representation in the present litigants of the same class to which they belong.

Morton *v.* New Orleans R. R., 75 Ala., 590, 611.

See also

Knickerbocker Trust Co. *v.* Penacook Mfg. Co., 100 Fed., 814.
Dickerman *v.* Nor. Trust Co., 80 Fed., 450.

Tenth.—The construction of the clauses of the Constitution giving jurisdiction to this Court over controversies between States and between States and citizens of other States should be liberal in the extreme to favor such jurisdiction and to carry out the beneficent purposes by the Constitution sought to be obtained.

There is a school of thought or method of construction which is well illustrated in the dissenting opinion of Mr. Justice Iredell in Chisholm *vs.* Georgia.

This method is based upon and is the product of

conceptions which prevailed prior to the adoption of the Constitution and which, to those adopting it it seems impossible that the Constitution could have been intended to supersede.

Another illustration of this method may be found in the remarks of Mr. Justice BRADLEY in Hans *vs.* Louisiana, 134 U. S., 15. Says the learned Justice: "The truth is that the cognizance of suits and actions *unknown to the law* was not contemplated by the constitution when establishing the judicial power of the United States," also on pp. 13 and 14, "Adhering to the mere letter it might be so; and so in fact the Supreme Court held in Chisholm *vs.* Georgia; but looking at the subject as Hamilton did and as Mr. Justice IREDELL did in the light of history and experience and the *established* order of things, the views of the latter were clearly right —as the people of the United States in their sovereign capacity subsequently decided."

On the other hand there is a school of thought or method of construction which is well illustrated in the prevailing opinions of the Court in Chisholm *vs.* Georgia.

This method is based upon and is the product of the conception that the habits and practices of nations which existed prior to the adoption of the Constitution were productive of grave evils which, so far as the States which proposed "to form a more perfect union" were concerned, might be avoided or greatly modified, and that the Constitution was designed to and had modified them and did not perpetuate them.

Said Mr. Justice WILSON, p. 463, after commenting on evils to be remedied: "In order therefore to form a more perfect union to establish justice to insure domestic tranquillity, to provide for common defense, and to secure the blessings of liberty

those people among whom were the people of Georgia ordained and established the present constitution. By that constitution legislative power is vested, executive power is vested, judicial power is vested."

Another illustration may be found in the opinion of Mr. Justice CUSHING (p. 467): "One design of the general government was for managing the great affairs of *peace and war* and the general defence, which were impossible to be conducted with safety by the States separately. Incident to these powers and for preventing controversies between foreign powers or citizens from rising to extremities and to an appeal to the sword, *a national tribunal was necessary*, amicably to decide them, and thus ward off such fatal public calamity. * * * As controversies between State and State and between a State and citizens of another State might tend, gradually, to involve States in war and bloodshed, a disinterested *civil* tribunal *was intended to be* instituted to decide such controversies, and preserve peace and friendship."

Between these parallel lines of reasoning a choice must be made. Each is logically perfect enough in itself. The choice must be made at the start. Was the Constitution adopted as a mere amendment or modification of the existing order of things, or was it a radical change and intended to destroy evils theretofore supposed necessarily to be permanent, and to supply remedies theretofore unknown?

We claim that the latter is the true construction, and to maintain our contention we call attention to the evils then existing, and which it was intended to remedy.

During the period preceding the Constitution covered by history "government" meant the administration of the affairs of an organized political

community, in the interest, and for the benefit, of the governors.

When these governors, whether called consuls, kings, emperors, aristocracies, or by any other name, wanted more power, wealth or glory, *war* was the means by which they sought it, and patriotism the high name under which they attempted to justify acts that between individuals would be called robbery and murder.

Human society had made but little advance by organization into political communities, for they were all in arms against each other, animated by the same spirit of aggression and selfishness that is supposed to have prevailed in the most primitive human society.

The cause of our revolution is a good illustration of the general condition.

England was engaged in wars in which her American colonies had no interest. She assumed to tax us for her own benefit, without our being represented in her Parliament, and the war for independence followed.

With the end of that war; with the abandonment of the articles of confederation under which it had been carried on—and with the adoption of the Constitution there came a new era in the political history of mankind.

We were thirteen "sovereign and independent" States; each having the high "sovereign" right to injure any of the others by war or any minor method—each having the right to negotiate and make treaties with each other—each having the right to prohibit or allow personal or commercial intercourse and to provide the terms on which it should be allowed.

Now, what was done and what was the great principle on and through which this, our Union, was secured?

The answer is, that so far as the thirteen original

States and the others which have since been admitted are concerned, that the right to make war upon each other, *for any cause and upon any pretense*; the right to make treaties with each other; the right to enact tariffs against each other; the right to exclude the citizens of one from any rights, privileges or immunities in another enjoyed by the citizens of that other, and many other rights of mutual injury and destruction which had been enjoyed by "sovereign states" from time immemorial were given up and abandoned; and in their place was established this Court, wherein all the questions which might or could arise between these "sovereign states" should be decided; not by clash of arms; not by the method and in the manner of the wild animals of the world; but, in the language of one of the justices of this Court, "in the peaceful forms of judicial procedure."

Let us see for a moment what the Constitution did to the States of the Union.

It provided that "No state shall enter into any treaty, alliance or confederation, grant letters of marque and reprisal; coin money; emit bills of credit, make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts or grant any title of nobility."

No State shall, without the consent of Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of Congress.

No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement, or compact with another state, or with a foreign

power, or engage in war unless actually invaded, or in such imminent danger as will not admit of delay."

Think for a moment of the numberless things which one and another of these States has tried to do in contravention of these prohibitions; think of the conflicts and wars which would have resulted with all the horrors and miseries which attend such methods of solution of controversies, and then think of the constitutional method by which the controversies have been actually settled. The peaceful form of judicial procedure, the adjudication by the tribunal provided by the Constitution—the Supreme Court of the land; the elimination of the old method, the inauguration of the new. To our minds that seems the longest step in human progress and human civilization ever taken; the largest and broadest and happiest political generalization ever conceived by the human mind.

Now, we submit that it is impossible to consider a question of the jurisdiction of this Court under the Constitution as isolated and depending only on the judiciary clauses.

They are part of one great whole. They are part of one great political conception which never before had been even shadowed to mankind. They are part of a new plan of justice and peace.

How can we construe this Constitution as advised by the dictum of Mr. Justice BRADLEY (*nomen venerabile*) "in the light of history and experience and the established order of things" when the very purpose and object of its adoption were to overturn and destroy "the established order of things" and to institute a new order of things in the place of the old, which "history and experience" had shown to be bad?

Never before was a court known having jurisdiction to decide upon the validity of acts by the ex-

ecutive or the legislative branches under the Constitution.

Can it be supposed that such changes as we have enumerated were conceived or thought of as mere amendments or modifications of an old order of things? That in the construction of the Constitution we are to be guided and governed by the notions prevailing when to a few great men was revealed the new light and hope for human progress?

Is it not, rather, our duty to recognize and familiarize ourselves with the new order of things; to see that to the judiciary is given in that new order the very highest and most responsible function; that of the universal solvent of all controversies that can possibly arise as well between "sovereigns" as between individual citizens?

Looked at in that light, judged by that standard, how small and trifling seem such objections to the jurisdiction over this controversy between States, as that the donor hoped that such controversy might supervene or that others, not donors, might incidentally reap some advantage.

Looked at in the spirit of the Constitution, can there be a grander spectacle than the submission to this Court of this controversy between two States and their loyal acceptance of its decision?

Eleventh. ~~Fourth.~~ Plaintiff should have a decree as prayed for in the bill of complaint.

WHEELER H. PECKHAM,
R. W. STEWART,
Of Counsel for Complainant.

No. 8 Orig.

Motion for leave to take testimony

Supreme Court of the United States

OCTOBER TERM, 1901.

Filed May 5th 1902.

No. 11, Original.

THE STATE OF SOUTH DAKOTA

against

THE STATE OF NORTH CAROLINA ET AL.

MOTION FOR LEAVE TO TAKE TESTIMONY.

And now comes The State of South Dakota and moves the court that the testimony in this case be taken orally in the same manner as provided for the taking of testimony in the circuit courts of the United States, sitting in equity, by rule 67 of the rules of practice in equity promulgated by this court, and that any person or persons agreed upon by the parties to this case, not in default for want of an answer, may act as commissioner to take such testimony, the same as if he had been specially appointed by this court, and that in default of such agreement any justice of this court may appoint such commissioner or commissioners; that one or more commissioners may be appointed, each to take testimony in any named locality, and each to act as if he were

sole commissioner; that the time to take such testimony be limited to the first day of October next, and that the same be returned to this court and filed with the clerk thereof on or before the first Monday of October, 1902.

JOHN L. PYLE,
Attorney General of the State of South Dakota.
ROBERT W. STEWART,
Solicitor for the State of South Dakota.

WHEELER H. PECKHAM,
Of Counsel for the State of South Dakota.

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1901.

STATE OF SOUTH DAKOTA
against
STATE OF NORTH CAROLINA ET AL. } No. 11, Original.

FORM OF PROPOSED ORDER.

The State of South Dakota having filed its replication to the answer of The State of North Carolina, and moved for the appointment of commissioners to take testimony, now, on motion of counsel for complainant, The State of South Dakota, it is—

Ordered, that the testimony in this case be taken orally, in the same manner as provided for the taking of testimony in the circuit courts of the United States, sitting in equity, by rule 67 of the rules of practice in equity promulgated by this court, and that any person or persons agreed upon by the parties to this case, not in default for want of an answer, may act as commissioner to take such testimony, the same as if he had been specially appointed by this court, and that

in default of such agreement any justice of this court may appoint such commissioner or commissioners; that one or more commissioners may be appointed each to take testimony in any named locality and each to act as if he were sole commissioner; that the time to take such testimony be limited to the first day of October next, and that the same be returned to this court and filed with the clerk thereof on or before the first Monday of October, 1902.

[Endorsed:] Supreme Court U. S., October term, 1901. Term No. 11, original. The State of South Dakota, complainant, *vs.* The State of North Carolina *et al.* Motion for leave to take testimony and form of proposed order. Filed May 5th, 1902.

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Office Supreme Court U.S.
FILED
DEC 15 1902
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 8, Original.

STATE OF SOUTH DAKOTA, COMPLAINANT,

vs.

STATE OF NORTH CAROLINA AND OTHERS.

Motion for Leave to Open Depositions, Print Record, and Assign Cause for Hearing.

Now comes the complainant, by its attorney, Wheeler H. Peckham, and, representing to this honorable court that the taking of depositions has been completed, moves the court for leave to open the depositions and for leave to print the record, and also moves the court to assign the cause for hearing upon a day to be fixed.

WHEELER H. PECKHAM,
For Complainant.

FILE COPY.

Office Supreme Court U.S.
FILED
JAN 19 1903
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 8, Original.

THE STATE OF SOUTH DAKOTA, COMPLAINANT,

vs.

THE STATE OF NORTH CAROLINA ET AL.

MOTION FOR LEAVE TO FILE STIPULATION CONCERNING PRINTING OF THE RECORD AND FOR ORDER DIRECTING CLERK TO PRINT IN ACCORDANCE THEREWITH.

Now comes The State of South Dakota, complainant, by Wheeler H. Peckham, its solicitor of record, and moves this honorable court for leave to file in this case the stipulation of counsel hereto annexed, and also for the entry of an order directing the clerk of this court to prepare the printed transcript of the record for distribution to the court on the trial of the cause in accordance with the terms of said stipulation.

WHEELER H. PECKHAM,
Per F. D. McK.,
Solicitor of Record.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1901. IN EQUITY.

No. 9, Original.

THE STATE OF SOUTH DAKOTA, *Complainant*,
v.
THE STATE OF NORTH CAROLINA ET AL.

STIPULATION AS TO PRINTING RECORD.

It is agreed by all the parties to this suit who have made appearance before this court, to wit, The State of South Dakota, the complainant, The State of North Carolina, the defendant, and Charles Salter, a defendant, that the printed record shall be constituted as follows:

1. The motion for process and bill of complaint.
2. The order of the court directing process to issue against the defendants for their appearance.
3. The answer of the defendant, The State of North Carolina.
4. The answer of the defendant, Charles Salter.
5. The replication of the complainant.
6. The order of the court for the taking of testimony.
7. All stipulations of counsel in their chronological order.
8. The depositions taken before Goodner, commissioner, in South Dakota, except that only one of the bonds and the coupons, together with the endorsement thereon, shall be printed, it being similar in all respects, except as to the serial number, with the others held by the complainant State.

9. The depositions taken before Lucas, commissioner, in New York city.

10. The depositions taken before Battle, commissioner, in Raleigh, North Carolina, including all the acts of the General Assembly of North Carolina referred to in the pleadings and in the testimony of the witnesses in this suit or introduced before the said Battle, commissioner.

11. The depositions taken before Watts, commissioner, in Washington, D. C.

12. The order of the court setting the case down for hearing on the 13th of April, 1903.

It is agreed that the clerk shall print only so much of the record as is above mentioned.

This is the 12th day of January, 1903.

WHEELER H. PECKHAM,
Of Counsel for Complainant.
J. C. L. HARRIS,
Of Counsel for the State of South Dakota.
ROBERT D. GILMER,
Attorney General of the State of North Carolina.
D. L. RUSSELL,
Counsel for Defendant, Charles Salter.

[Endorsed:] In the Supreme Court of the United States, October term, 1901. No. 9, original. The State of South Dakota, complainant, *vs.* The State of North Carolina *et al.* Motion for leave to file stipulation and for order concerning printing of the transcript of the record and stipulation as to same.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1902.

No. 9 ORIGINAL.

SOUTH DAKOTA,

vs.

NORTH CAROLINA,
CHARLES SALTER,
SIMON ROTHSCHILDS,

Brief for Second Mortgage Bondholders.

I.

RIGHT OF SECOND MORTGAGEES TO REDEEM.

It appears that the defendant State at the time of making the mortgage was the owner of 30,000 shares of stock of the par value of $3,000,000, and that the mortgage was of such an *amount of stock* as should *equal at par the par of bonds* to be issued in aid of the Western North Carolina Railroad. It also appears that at the time of this mortgage the State's 30,000 shares was subject to a first mortgage to secure 6 per cent. thirty year bonds for $3,000,000, which are known as "first mortgage bonds," so that the bond issue, some of which is owned by the plaintiff State, is secured by a *second* mortgage upon the stock.

The first mortgage bonds matured in 1879, *some years subsequent* to the issue of the second mortgage bonds, and, of course, the second mortgage bond holders had a right to redeem the first mortgage.

Under those circumstances, the defendant State, in 1879,

passed an act to renew the first mortgage bonds by the issuance of a forty year bond at 6 per cent., to stand in the place of the original first mortgage bonds; it being provided that the new bonds were not an extinguishment of the old bonds, but a *renewal* and *extension* of the same, and without prejudice to the old bonds. It further appears that, nevertheless, the old bonds were surrendered by their holders and delivered up to the State, and were destroyed and cancelled; so that the forty year bonds were in fact new bonds; so that there was a surrender and cancellation of the whole issue of the old bonds by their holders and an acceptance by them of new bonds for a different amount, as more fully appears by Exhibit C, attached to the bill. (Rec. 12 et seq.)

The holders of the second mortgage bonds were not *parties to* and did *not consent* to the alleged extension of the first mortgage bonds; and so, if the first mortgage bonds were not actually extinguished, but were, as is claimed by the holders and by the defendant State, simply *extended* as respects the time of their maturity, then the extension as respects the holders of the second mortgage bonds was ineffective The maturity of the first mortgage could not be postponed without the consent of the second mortgagees, who possessed a vested right to pay off and discharge the first mortgage, according to its terms concerning maturity. But if the first mortgage bonds were not extended, but were actually extinguished, then the seond mortgage, held by the plaintiff State and the other holders of the same issue of bonds, is a first mortgage.

Mr. Justice Campbell, of Michigan, said: "That a second mortgagee has an absolute right, at any time after the coming due of a prior incumbrance, to redeem it and be subrogated to it; and further said that the right of a second mortgagee to redeem a prior mortgage cannot be *cut off or prejudiced by arrangements between the holder* of the first mortgage and the mortgagor for an *extension* of time to pay it.

Sager vs. Tupper, 35 Mich., 134.

In Iowa, it was said: "That the right of a second mortgagee to redeem, after the maturity of the prior mortgage,

is not affected by the fact that the time of the payment of the debt secured by the first mortgage had been extended, if the junior mortgagee had no notice of the extension (before taking his mortgage).

Wheeler vs Menold, 81 Ia., 647.

II.

PARTIES.

In any aspect of the case, the first and second mortgage bondholders, upon the general principles of equity, being interested in the funds, must be made parties to the suit.

The rule in equity upon the subject is that all persons who have an interest in a suit must be made parties; and it is also a familiar rule that when it is impracticable to bring before the Court all interested, it is sufficient to make such persons parties as have a common interest with those who are absent. In such a case the parties who are present in the suit represent the rights of those who are absent, and the Court proceeds to make its decree binding the rights of the absent parties.

Story Eq. Pl., 97, 112.

Florida vs Georgia, 17 How., 510.

The language of the latter case is by Mr. Justice Curtis, in a dissenting opinion, but not dissenting upon this point.

Under this rule the first mortgage bondholders are represented as a class by the defendant Simon Rothschild, a citizen of New York, and the second mortgage bondholders, holding bonds of the same issue as those sued on are represented by the defendant Charles Salter, also a citizen of the State of New York.

In such cases, equities adjudged against parties served with process are binding upon all persons *of the same class*, although absent from the litigation, because of the *vicarious*

representation in the present litigants of the same class to which they belong.

Morton v. New Orleans R. R., 75 Ala, 590, 611.

See also—

Knickerbocker Trust Co. v. Penacook Mfg. Co., 100 Fed., 814.

Dickerman v. Nor. Trust Co., 80 Fed., 450.

Clearly there is jurisdiction between the plaintiff State and two citizens of another State, viz.: the State of New York; just as there is jurisdiction between the plaintiff State and the defendant State of North Carolina; and no objection is perceived to joining the defendant State with two citizens of another State as defendants.

In Missouri vs. Illinois, 180 U. S., 208, a citizen of the defendant State, a corporation by the name of the Sanitary District of Chicago, was joined as a defendant with the State of Illinois.

In South Carolina vs. Georgia, 93 U. S., 4, individuals were joined with the defendant State, and the jurisdiction sustained.

So also Louisiana vs. Texas, 176 U. S., 1.

This bill necessarily makas the senior mortgagees parties, as it seeks a sale of the stock free from incumbrances; and it is *in effect a bill to foreclose the second mortgage and to redeem the first mortgage.*

The plaintiff State, bringing *all* persons in interest before the Court, and both mortgages being *overdue*, and all bondholders being *proportionally* interested, seeks a sale of the mortgaged property. This, under the rules of equity, it is *required* to do for the purpose of collecting its own debt.

While a bill to foreclose a second mortgage does not require to have a first mortgagee made defendant, yet, when the decree sought is subject to the mortgage of the first mortgagee, and his mortgage is due, he may be made a party; and if, as in the present case, the property should be ordered to be sold free of incumbrances, the first mortgagee *must* be made a party, and the bill in such a case is, in *effect*, *both a bill* to

foreclose the *second mortgage* and a bill to *redeem* the first mortgage.

GRAY, J., in Heffner v. N. W. Life Ins. Co., 123 U. S, 747, 754 *top*, and cases cited.

See also—

Jerome v. McCarter, 94 U. S., 734.

Sutherland v. L. S Co., 1 Cent. L. Jour., 127.

McClure v. Adams, 76 Fed., 899.

Nothing in equity principles requires this complainant State to invite the other holders of this issue of bonds to join in the suit. Courts of equity do not require a mortgagee holder of a fraction of a mortgage debt to call upon his associate mortgagees to unite with him in a suit for foreclosure. He may make them defendants.

2nd. Jones on Mortgages, Sec. 1369, from which we quote: "It is not very material, however, in an equity suit, whether more than one of the persons interested in prosecuting it is nominally made plaintiff It is generally sufficient that the person to be bound by the decree shall be brought before the Court in some capacity. (Wilkins vs Frye, 1st Mer. 244-262, per Sir Wm. Grant, "In equity it is sufficient that all parties interested in the subject of the suit should be before the Court, either in the shape of plaintiffs or defendants.") When a person having an interest in the security is made a defendant in the action, the Bill ought to show his refusal to join as a plaintiff; but this admission is not material unless such defendant objects by demurrer. (Hancock vs. Hancock, 22 N. Y. 568, and Carpenter vs. O'Dougherty, 58 N. Y. 681.) If several persons have right and interest in the same demand and security, even if these are not strictly joint, and are entitled to the same relief, they should naturally join as plaintiffs in seeking it. But if one of the persons so interested institutes the suit, and makes the others having like interest defendants, the requirements of equity are generally satisfied. If several persons have claims alike in being antagonistic to the defendant, but several and distinct in their nature, because they have arisen out of different events and circum-

stances, although they may join as co-plaintiffs in seeking the same relief, in actual practice one person, perhaps by reason of his greater interest or more urgent occasion for relief, institutes a suit without asking the co-operation of the others, making them defendants. And finally, as no one can be made a plaintiff against his will, this practical restriction in many cases determines the question whether a person shall be made plaintiff or defendant."

See also Rankin vs. Major, 9th Iowa, 297; Thayer vs. Campbell, 9th Mo., 280.

But according to the doctrine settled by this Court in Stuart vs. Dunham, 115 U. S., 64, the individual second mortgage bond holders could have become co-complainants without violating the 11th Amendment, and the jurisdiction would not have been lost. Says the 11th Amendment: "Individuals shall not sue a State in the Federal forum." Says the Constitution when it limits Federal jurisdiction to controversies between citizens of different States: "A citizen of a State shall not sue a citizen of the same State in the Federal forum unless jurisdiction attaches by reason of the nature of the action." The case was originally constituted between citizens of different States The jurisdiction depended upon diverse citizenship, and that alone. The original plaintiff sued for himself and all other creditors of the defendant who should join as plaintiffs. After the case was constituted and removed to Federal Court certain creditors, citizens of the same State with some of the defendants, came in and were permitted to join as plaintiffs, and the *original bill amended accordingly*. This Court held that the jurisdiction was not lost.

III.

SECOND MORTGAGE IS *IN SOLIDO* AND NOT A SEPARATE AND INDEPENDENT MORTGAGE OF TEN SHARES FOR EACH BOND.

It appears from the bill and exhibits B thereto that the defendant State made a mortgage to secure the bonds sued on

and the whole issue, in the following language: "The public treasurer is hereby authorized and directed, whenever it shall become his duty under the provision of said acts to *issue bonds* of the State,.... to mortgage an *equal amount* of stock which the State now holds in the North Carolina Railroad as collateral security for the *payment of said bonds*, and to execute and deliver with each several bond a deed of mortgage for an equal amount of stock of said North Carolina Railroad, said mortgage to be signed by the treasurer and countersigned by the comptroller, to constitute a part of said bond, and to be transferable in like manner with it, as provided in the charter of said Western North Carolina Railroad Company; and further, that such mortgage shall have all the force and effect, in law and equity, of actual mortgages without actual registry."

The defendant State was owner of 30,000 shares of stock in the North Carolina Railroad Company, of the par value of $3,000,000; shares $100 par.

It will be observed that the treasurer was directed to mortgage an amount of *stock equal to the bond issue*, and that a *proportional* amount of stock was to be made collateral security for the payment of each bond; that is to say, a number of shares of $100 each was to be collateral to each bond, and a number of shares at that figure was to make a sum equal to the par bond, and upon the bond there was endorsed a statement to that effect.

We contend that this mortgage, in equity, stands as security *for all* the bonds, and that the bonds, being sold to different persons, the mortgage still stands for all the bonds, *pro rata*.

Such is the general rule with regard to mortgages securing a large number of bonds, and there is nothing in the language of the act of the defendant State showing an intention to *vary the general* rule on the subject. Vast numbers of bonds secured by mortgage have been in use in this country, and nothing is discovered in the terms of the North Carolina act to indicate any purpose to *vary the general rule*. *No specific shares* of stock are attached to any particular bond. The lan-

guage "ten shares of the stock" plainly indicates *simply that proportion* out of the whole number of shares of stock mortgage. The shares of stock mortgaged were an *amount equal to the number of bonds* issued. That is the contract in substance; the actual words are "when the treasurer shall issue bonds of the State to the amount of $50,000 or more, he shall mortgage *an equal amount of stock, as collateral security for the payment of said bonds*" Plainly, the *whole amount* of shares of stock becomes security for the whole *amount* of the bonds.

The general rule in equity is stated in 3rd Am. Ed. 1859, Phila., White and Tudor's Leading Cases in Equity, Wallace's notes to the cases of Row vs Dawson and Ryall vs Rowles.

It is there stated, on p. 646, that where there are different obligations secured by the same mortgage, the mortgage creates a *trust for the payment of all* the obligations under which each bond holder has equal claims, and that the question is one of *contract* or intention, p. 647.

On p. 369 same vol., is stated the general doctrine given above, that the mortgage is simply security for debt, and that whatever transfers the debt carries with it the mortgage.

The Supreme Court of Michigan say, in

English vs. Carney, 25 Mich., 178, 181 (bottom), that it is settled, in accordance with the weight of authority, that a mortgage given to *secure several* obligations stands as *security for the whole*, and that, if a mortgagee assigns one of the obligations to a third person, the mortgage in equity would stand as security for all the obligations, as well to the one assigned as those retained.

It is further said, at the top of p. 182, that when all bonds are sold and transferred, each to a different person, the mortgage will stand as an *equal security* for all the obligations, *pro rata*.

The United States Circuit Court of Appeals, 6th Circuit; in Kortlander vs. Elston, 52 Fed. R., 180 and 183 (bottom), recognizes the doctrine laid down in the case of English vs. Carney, and says that in that case it was held on foreclosure

that the proceeds of sale must be applied *pro rata* to all the notes, because a pro rata application of security to all the notes was fixed by the original *contract* of the mortgage.

It may further be said that the certificate upon the bond, with regard to security for 10 shares, being no *part of the statute* cannot *affect* the *construction* of the statute; and, as to the construction of the statute, the rule is that what is implied in it is as much a part of it as what is expressed. That is, the intention of the maker of the statute being as much within the statute as it is within the letter the Court has to ascertain the meaning, which was to mortgage all the stock to secure all the bonds, each proportionally.

U. S. v. Babbitt, 1 Black (U. S.) 61.

County of Watson vs. Natl. Bank, 103 U. S., 770.

This second mortgage is not a series of several hundred or several thousand independent mortgages. It is not a separate and several mortgage for each bond, but it is a mortgage in solido upon all the shares included in the mortgage. That is, upon so many shares as being added together should equal in their par the amount of the bonds to be issued. The intention was, as is always the case in mortgages to secure bonds, that each bond holder should stand upon an equal footing with every other bond holder.

The State Treasurer and Comptroller when they executed the "Deed of Mortgage" used the expression, "ten shares are hereby mortgaged to secure this bond." But this expression was only to notify the holder that he and his associate bond holders had a mortgage on an amount of the stock equal to the amount of the bonds. It was never intended that one bond holder should get an advantage over his associate bond holder by obtaining ten shares and acquiring the exclusive title thereto. He was not entitled to any particular ten shares. But he and his associates were entitled jointly to all the shares that were mortgaged. The mortgagor State and the mortgagee bond holders settled this point by their own action. The mortgagor State had 30,000 shares ($3,000,000 par.) Of this 10,000 shares ($1,000,000 par) was preferred

stock. (Record 149 bottom.) The other 20,000 shares ($2,000,000 par) was unpreferred stock. When the mortgagor State executed its "Deed of Mortgage," the method and manner of the deed being directed and fixed by the Act of 1866 which created the Second Mortgage, it included in the mortgage only the unpreferred stock; that is, the two millions of stock authorized by the Act of 1849, which was "*originally subscribed*" by the State. The endorsement or mortgage (Record 10 bottom) calls for stock "*originally subscribed.*" The $2,000,000 subscribed by the Act of 1849 was the "original subscription." The second subscription was by the Act of 1855 and was preferred stock. So the mortgage was and is only on the two million of unpreferred stock. But the State issued more than two million of bonds (Answer of North Carolina, Art. II., Record 15.) It issued $2,463,000. So there were not shares enough to "go around" There was not enough stock to give ten shares for each one thousand dollar bond. Who will deny that while these issues were outstanding the mortgagee bond holders would have been compelled in equity to *pro rate* on a foreclosure? This action of the mortgagor and mortgagees fixes the fact that they intended the mortgage to be in solido. True it is that *now* the amount of outstanding bonds is less than the amount of the unpreferred stock, but if the mortgage was in solido when executed it is so now.

The mortgage being for the benefit of all the bond holders, each bond holder has an undivided and undivisable interest in each and every share of stock. This defendant, Salter, and his associate holders of Second Mortgage bonds have an interest, a vested right, as much in the one hundred shares belonging to Complainant as in any other shares,—indeed as much as he has in the ten shares called for by his own individual bonds. This Court cannot set apart one hundred shares for Complainant save by wrongfully depriving this defendant and his associates of their property in such one hundred shares.

We submit that the rights of Complainant can only be administered by the sale of the mortgaged stock and the distribution of the proceeds pro rata among all the mortgagees.

The benefit derived by individuals is merely incidental in the course of this suit wherein the Court is bound by the Constitution to give relief to the Complainant. This constitutional jurisdiction ought not to be defeated because in the enforcement of it individuals may obtain benefits. They are in no sense plaintiffs. They are not seeking nor are they entitled to a judgment against the defendant State. They are simply interested in the *res*. It plainly appears that the security is not sufficient to pay the Second Mortgage bonds in full. Suppose the outstanding Second Mortgage bonds are $250,000 par. Their coupons amount to, say, $450,000. The stock ($250,000) being sold, say, at $160, would show, say $16,000 to be applied to the ten bonds of complainant. This would leave still due on complainant's bonds, say, $10,000. For this complainant would be entitled to judgment quod recuperet against defendant State. But the individual Second Mortgage holders could not recover. No judgment can be passed in their favor How then can they be held to be plaintiffs?

In Stuart v. Dunham, 115 U. S. p. 329, being a Creditors Bill to set aside fraudulent conveyances, and the jurisdiction being based upon diverse citizenship, it appeared that other creditors who were citizens of the same State with the Defendant were permitted to come in and prove their claim, thus, in substance, forcing the Court to permit a citizen of one State to enforce his claim in the Federal forum against a citizen of the same State. The Court said, in substance, that their introduction as complainants did not oust the jurisdiction, because the bill having been filed by the original complainants on behalf of themselves and other creditors choosing to come in and share in the expenses of litigation, the Court in exercising jurisdiction between the parties would *incidentally* decree in favor of all other creditors coming in under the bill, saying that such a proceeding was merely ancillary to the jurisdiction acquired as between the original parties, and it was merely matter of form whether the new parties came in as complainants or were allowed to prove their claim before a Master under a decree ordering a reference to prove the

claims of all persons entitled to the benefit of the fund; the Court further saying that if the latter course had been adopted no question of jurisdiction could have arisen, and that the adoption of the alternative course is the same thing.

IV.

ATTEMPT OF DEFENDANT STATE TO AVOID ITS RECOGNIZED OBLIGATIONS.

North Carolina after acknowledging these second mortgage bonds as a part of its recognized *ante bellum* debt, scheduling them for funding at twenty-five per cent. of their principal, (Compromise Debt Law of 1879. See Record 131, section 1 and 4 of the Act,) and discharging millions of them at this rate, (answer of N. C., section IX., Record 18,) seeks to vitiate them by alleging that State Treasurer did not obey the Act of 1855, which required him to advertise before issuing and directed that he should not sell for less than par. He did advertise as required. (Record 81 et seq.) He did sell for par. The State owed the Western Railroad Company for unpaid subscription to its stock. The Company said to the State: "We will give you par for the Bonds. You pay for your stock according to your contract." The transaction was precisely the same as if the Railroad Company had borrowed say one million cash from a bank, then handed the one million to the State for one million of bonds, then demanded of the State one million cash for payment of stock subscription and got it, and then handed the one million to the bank. (Deposition of Battle who was State Treasurer in 1867, when bonds were issued. Records '83, et seq.)

But the State Treasurer when he issued these bonds in 1867, was not required to advertise, nor was he prohibited from selling below par. (Act of 1867, Record 170.)

This Act, sec. 1, *required* him to issue the bonds for the stock upon certificate of Railroad President to Internal Improvement Board. Substance of this Act was that State should exchange bonds for stock, dollar for dollar.

Nor was there any reason why the State Treasurer should not have exchanged the State Bonds for the Railroad Stock as he did. In doing so he was complying with the Act of 1855 (Record 116) which made the State subscription to the stock of the Railroad Company. Counsel for the defendant State seemed to make the point (Record 91, bottom et seq.) that the spirit and intention of the Act of 1855 were that State Bonds *should* not issue unless the Railroad Company could realize par in *cash*, because the State, as the holder of two-thirds of the stock in the Railroad Company, was jointly concerned that the Company should get par for the Bonds, and so, says defendant State, the law was violated in the issuing of these Bonds and they are void. This point will not do for many reasons, some of which are these:

1. It is too late for the obligor to deny his Bond after recognizing it for thirty-five years by paying its coupons for a time and by scheduling it as a part of his recognized debt in his offer of compromise to his creditors. In deed the bonds sued on, dated in 1867, are part of the issue under the Act of 1855, so that the obligor has recognized the issue for forty-eight years.

2. Ten years after the first issue, (in 1866), he secured by mortgage such as had not been and so were thereafter to be issued, thus recognizing them and commending them to purchasers.

3. The Act of 1867 discarded such spirit and intent and abandoned such policy, if it ever existed, by expressly requiring the State Treasurer to issue the bonds (Record 170); and this Act was passed when, as this record shows, (Answer of North Carolina, Art. IX, Sec. 18), and as this Court knows, it being a matter of public history, the State was at the bottom of its bankruptcy and poverty, its debt out of all proportion to its property and its bonds below par.

But the Act of 1855 was obeyed. The direction was that the State Treasurer should not sell for less than par. He did sell for par. The Railroad Company did pay par. There is nothing in the Act of 1855 which can be tortured into an expression of a purpose to prohibit the sale of the bonds

to the Railroad Company at par unless the Company could get par for them on the market. In those days North Carolina paid her debts. She never thought to evade payment of that stock subscription, and, if her bonds had fallen below par on the market, she would gladly have given them to her creditors at par. She had not then descended to repudiation.

V.

MOTIVES OF ASSIGNORS—TITLE OF COMPLAINANT.

Where, as in the present case, the State does not assume the prosecution of the debt owing by the defendant State for the benefit of its citizens, but is itself the real, actual *bona fide* owner of the debt, acquired by virtue of the act of the Legislature of the plaintiff State by a donation from individuals, it makes no difference that the Court may surmise, or that the fact may be conceded to be that the motive of the individuals in making the donation to the plaintiff State was the bringing of suit by the plaintiff State in this Court against the defendant State.

It has been held in many cases that where conveyances are made for the purpose of vesting title in the plaintiff to enable him to bring suit, the Court, in deciding the question of jurisdiction, will not inquire into the motive for making the conveyance where the transaction is real and not colorable, and the plaintiff becomes the real, actual and beneficial owner of the claim sued on, as is the case here, under the act of the Legislature of South Dakota, 1901.

Marshall, C. J., McDonald vs. Smith, 1 Pet., 620.

Barney vs. Baltimore, 6 Wall., 280.

Smith vs. Kernochan, 7 How., 198.

Dickerman vs. Northern Trust Co., 176 U. S., 181.

In the Dickerman case it appeared that the mortgage securing the bonds provided that the bonds should be payable if

any execution should be sued out against the mortgagor company and not paid. A bond holder brought suit before a Justice upon six coupons and the mortgagor company consented to a judgment and the issue of the execution and on the same day the trustees under the mortgage gave notice that by reason of the execution being unpaid the principal and interest upon all the bonds should become due and immediately took possession of the property, and the Court held that while the proceedings were taken by connivance and consent of the parties they were not collusive in the legal sense and the debt was honestly due and the plaintiff entitled to judgment. It was also held that although the judgment was got for the obvious purpose of enabling the trustees under the mortgage to declare it to be due, the Court would not inquire into the motives of the parties. The Court said that it is well settled that while a mere colorable conveyance of property for the purpose of vesting title in a non-resident to enable him to bring suit in the Federal Court will not confer jurisdiction, the Court will not, in deciding upon the question of jurisdiction, inquire into the motive of making the conveyance, if the conveyance appears to be a real transaction.

And the Court said that if a person took up a *bona fide* residence in another State he might sue in the Federal Court, notwithstanding his purpose was to resort to a forum of which he could not have availed himself if he were a resident of the State in which the Court was held.

The Court further said that where a surety attacks a judgment against his principal, alleging that it was obtained for the purpose of defrauding him, the allegation will not stand unless it appears that no debt existed against the principal.

The Court also said that a person may buy stock in a corporation for the very purpose of bringing a stockholder's suit against the corporation, and that the law will not inquire into the motive which actuated his purpose.

The motives of complainants in conducting a suit cannot be inquired into because it is no defense to a legal demand

that the complainant is actuated by personal or improper motives.

Toler vs. East Tennessee Railroad, 67th Fed. 168.

VI.

TURPITUDE OF REPUDIATION.

The word repudiation was first coined in Mississippi about 1842, and became synonymous with dishonor among enlightened States the world over.

If an individual, able to pay his debts, purposely and continuously fails to do so, he is justly regarded as disreputable and, in this regard, a State stands on the same plane as an individual.

This Court stated in substance in the case of Louisiana v. Jumel, 107 U. S., 740, that when a State goes into the market as a borrower she lays aside her sovereignty and becomes responsible as an individual; and again in Murray v. Charleston, 96 U. S., 445, that a State which becomes a borrower, and contracts to pay the debt with interest, is not acting as a sovereign, but comes down to the level of ordinary individuals; and that, accordingly, there is no reservation of a sovereign right to withhold payment.

"Justice," said Burke, "is the great standing policy of all civilized States." No government worthy of the name will take advantage of any technical objections to avoid payment of a just debt.

Repudiation is simply the equivalent of confiscation. North Carolina claimed years ago to come within the category of an individual able to pay his debts and refusing to do so, and claimed to justify its non-payment on the plea of bankruptcy; alleging that she could not pay her debts in full, and that the stock in the North Carolina Railroad, which she had given to secure these Second Bonds, was without value, for the reason that the stock was not worth enough on the market to pay

the first mortgage; and accordingly she treated the Second Bonds just as if they were wholly unsecured.

The holders of the Second Mortgage Bonds now outstanding declined to take an offer of 25 cents on the principal with nothing on the coupons, which the State offered when she claimed to be insolvent; but now the stock given as security for the two sets of mortgage bonds is worth enough on the market to pay off, not only the first mortgage, but also the second mortgage, and leave $2,000,000 for the State.

And yet North Carolina retains the security, to pay the second mortgage bonds, and is guilty of the monstrous wrong of collecting every six months the income of the stock and turning it into its own treasury, without paying anything upon principal or interest of the second mortgage bonds, although that income so collected every six months, in equity and in common honesty is the property of the Complainant and the other second mortgage bond holders.

No language is too strong in which to denounce the turpitude of this proceeding.

Mr. Justice Custiss, in his article on the State debts already alluded to, (found in the volume of his memoirs, and first published in the North American Review in 1844,) declares that there is a remedy for such injustice and dishonesty in this Court, and that remedy is by placing a foreign sovereign or a State of the Union in a condition to bring suit against repudiating States in this Court; and the second mortgage bond holders might well have pursued that course in the present suit by requiring Complainant to agree to bring suit. This course would have been consistent with the ruling in New Hampshire vs. Louisiana, which only held that the plaintiff State could not recover when not the owner of the bonds sued on. But the second mortgage bond holders did not pursue this course. They assigned absolutely and unconditionally.

SUPPLEMENT.

Defendant State in the Depositions tried desperately to prove that the donation was made for the purpose of having a suit brought by a State. There is not in the Record a scintilla of evidence to show this purpose, unless the transaction itself is evidence of it as a sort of self-evident fact. But the transaction—that is, the act of donating—taken in connection with the evidence, does not show a purpose to have the suit brought. At most, it could only have been a hope in the breast of the donor, because the evidence is overwhelming and uncontradicted and conclusive that the donee State did not have any understanding or agreement as to bringing suit on the donated bonds. There is no evidence of any agreement, expressed or implied, that South Dakota would bring suit, while the negative is established beyond all question. (See Deposition of Mr. Burke who delivered the bonds to the Governor of South Dakota, Record 176 et seq. and ante; also Deposition of Governor Herroid, Record 32.)

ALFRED RUSSELL,
MARION BUTLER,
DANIEL L. RUSSELL,

Solicitors for Defendant, Charles Salter, representing Second Mortgage Bondholders.

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No. 8 ORIGINAL

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Clerk.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1902.

IN EQUITY.

THE STATE OF SOUTH DAKOTA, *Complainant,*

vs.

THE STATE OF NORTH CAROLINA, CHARLES SALTER AND SIMON ROTHSCHILDS,
Defendants.

SUPPLEMENTAL BRIEF FOR THE STATE OF NORTH CAROLINA.

ROBERT D. GILMER,
Attorney-General.
GEORGE ROUNTREE,
JAMES H. MERRIMON,
Counsel for the State of North Carolina.

JAMES E. SHEPHERD, *of Counsel.*

IN THE

United States Supreme Court,

OCTOBER TERM, 1902.

NO. 9 ORIGINAL.

THE STATE OF SOUTH DAKOTA, *Complainant,*
against
THE STATE OF NORTH CAROLINA, CHAS. SALTER AND SIMON ROTHSCHILDS, *Defendants.*

SUPPLEMENTAL BRIEF FOR THE STATE OF NORTH CAROLINA.

I.

No controversy within the meaning of the Constitution is presented in this suit between the complainant and the defendant States, in which a decree can be made and enforced against the defendant State or its property.

In an elaborate review of the cases in which this Court has assumed original jurisdiction under the judicial clause of the Constitution, the opinion in Missouri v. Illinois (~~105~~ 180 U. S., 208), did not disclose any in which such jurisdiction had been entertained for the purpose of enforcing the public obligations of one State in a suit brought by another, much less where the complaining State was the voluntary assignee of parties who could not themselves sue. The cases referred to relate to the

settlement of boundaries between the States, and State action whereby public waters between the States are obstructed, polluted or diverted. It is true that reference is made in *U. S. v. Texas* (143 U. S., 621) to *U. S. v. North Carolina* (136 U. S., 211); but a glance at the opinion will show that that case was noticed in respect to *parties* only and for the purpose of establishing the proposition that the United States could sue a State for the establishment of the boundaries of one of its territories. It is hardly to be supposed that by such a reference and for such a purpose this Court, by way of *obitur dictum,* considered or undertook to pass upon a question of such grave import, and attended, as we conceive, with such tremendous consequences, as affecting the fundamental principles of the government as well as the peace and harmony of the States by whom it was created. The point in U. S. v. North Carolina (*supra*), which "did not escape the attention" of the learned Justice who wrote the opinion, was that:

> "The judgment would not have been rendered except upon the theory that this Court has original jurisdiction of a suit by the United States against a State."

It is clear that no consideration was given to the *subject matter* of the suit, nor could any question have possibly arisen affecting the jurisdiction, inasmuch as it was a *case agreed* and *voluntarily* submitted upon the single question as to whether the bonds bore interest. It was agreed that judgment as to this question should be entered according to the decision of the Court, and it was so entered and in favor of the State. That the Justice did not have this aspect in mind would seem clear from

another part of the opinion, where he quotes with approval from the opinion in Hans v. Louisiana (134 U. S.,1), the whole trend of which is against the contention of the complainant in this suit. And in still another part of the opinion, in tracing the origin of the jurisdiction, he speaks of the necessity of such jurisdiction "in cases of boundaries *and like controversies,*" etc.

We insist that expressions of the character mentioned in U. S. v. N. C. (*supra*), if indeed any more can be found in the reports, cannot be regarded as authority upon the question under discussion. That this Court considers it an open question would seem clear from the fact that in Missouri v. Illinois (*supra*), the Court, as we have seen, after its exhaustive review, fails to mention any case where such jurisdiction has been exercised, and declares that:

> "It would be objectionable and, indeed, impossible for the Court to anticipate by definition what controversies can and what can not be brought within the original jurisdiction of this Court."

One thing it does say, however, and plainly says, and it is that the language of the judicial clause—"controversies between two or more States"—while sufficiently comprehensive to include *all* cases where one State may choose to make complaint against another, *does not* so include them, and that the general language used in *Cohens v. Virginia* (6 Wheat., 266), giving countenance to such a proposition, has been under different states of facts "modified."

As an illustration of this, reference is made to New York

v. Louisiana (108 U. S., 76); Wisconsin v. Pelican Ins. Co. (127 U. S., 265, and Louisiana v. Texas (176 U. S., 1).

After referring to such a "supposition," the Court says:

> "But in this, as in other instances, when called upon to construe and apply a provision of the Constitution of the United States, we must look, not merely to the language but to its historical origin, and to those decisions of this Court in which its meaning and the scope of its operation have received deliberate consideration."

In Florida v. Georgia (58 U. S., 478) Mr. Justice Campbell, speaking of the purpose of the judicial clause, said:

> "It was not in the design of the Constitution to alter or even modify the existing relations of any of the sovereign parties named in this article, to legal jurisdictions, by enlarging their liableness to suit; but its purpose was to erect tribunals to which they might resort for the determination of the suits which they might legally commence, or might voluntarily submit, or were subject to according to pre-existing conditions."

Although this was a dissenting opinion, it evidently expresses the intention and understanding of the framers of the Constitution. A learned constitutional historian, (Thorpe), speaking of the utterances of Marshall and Hamilton, says:

> "From this contemporary exposition, considering its high source, it must be concluded that the framers of the Constitution did not intend to make it possible to drag a sovereign State before a Federal Court. Rather it appears from the arguments of Marshall and Hamilton, that the Constitution guaranteed every State against being made defendant in any action that might be brought."

While these views have not been adopted in respect to controversies as to boundaries and the like, they could not but have impressed the Court with a proper sense of the grave consequences that might result from an undue extension of jurisdiction; and hence it has been said that such jurisdiction should be "sparingly exercised." It is also said in Louisiana v. Texas (176 U. S., 15):

> "But it is apparent that the jurisdiction is of so delicate and grave a nature that it was not contemplated that it be exercised save when the necessity was absolute and the matter itself properly justiciable."

The leading opinions upon the subject sustain us, we think, in the proposition that the jurisdiction was only intended to provide for those controversies which arise originally and directly between the States as States. As said by Chief Justice Fuller in Missouri v. Illinois, (Justices Harlan and White concurring):

> "It must appear that the States are in direct antagonism as States."

"And again in La. v. Tex. (*supra*), the Chief Justice, speaking for the Court, said:

> "The States can not make war or enter into treaties, though they may, with the consent of the Congress, make compacts and agreements. When there is no agreement whose breach might create it, a controversy between the States does not arise unless the action complained of is State action. As might be expected, in view of the nature of the jurisdiction, the cases are few in which the aid of the Court has been sought in controversies between two or more States. They are cited in Wis. v. Pel. Ins. Co. (127 U. S., 265), and are chiefly controversies as to boundaries."

Differences as to boundaries and other like cases, growing out of and incident to the States in their sovereign and corporate character, are quite different from the "controversy" which is sought to be created by the voluntary action of the distant State of South Dakota, with whose boundaries or territorial rights we can never be in conflict, and with whom the defendant has never made any compact or agreement whatsoever. Its suit is based upon the proposition that one State can acquire from individuals, and without value, the public obligations of another State, and enforce their collection by the process of this Court against such other State or its property.

A judgment is prayed for against the State for the amount due and the sale by foreclosure of property owned by and in the actual possession of the State (the dividends from which constitute a considerable part of its necessary revenue), and the application of the proceeds to the entire mortgage indebtedness, all of which is held by individuals, except the ten bonds sued upon. In other words, such property, now in the possession of the State, and such revenue therefrom, is to be wrested from its possession and enjoyment, and its fiscal affairs and other internal regulations disturbed and to a great extent controlled by the judicial power of this Court.

We do not consider that we are over adventurous in saying that in the adoption of this brief, general and indefinite jurisdictional clause, the granting of such a power to the Federal judiciary was never for a moment contemplated, and that if the framers of the Constitution had considered that it conferred such a power, so utterly at variance with the fundamental prin-

ciples of the government they were constructing, the clause would have been instantly rejected. We say, furthermore, that, had it been understood that such a power would be claimed, who can doubt that the States, while permitting one State to sue another in certain cases, would have expressly excluded the power here claimed at the time of the adoption of the Eleventh Amendment? Mr. Justice Miller, in his lectures upon the Constitution (page 382), says, that:

> "The amendment just quoted was supposed to have settled the question of the suability of a State upon its obligations or for its debts in any other mode than that to which the State should give express consent, and that the Courts of the United States had no jurisdiction to entertain such suits."

And in Cunningham v. Macon (109 U. S., 446) he concluded a learned opinion by saying:

> "The absurdity of this proposition shows the impossibility of compelling a State to pay its debts by judicial process"—

an opinion, we may say, which has generally been understood and assented to from the very foundation of this government. The proposition to which we have referred, and upon which this suit is predicated, has never received the "deliberate consideration" of this Court. Indeed, we may safely assert that it has never been presented, and that this is the first time that the Court has been confronted with such a grave and momentous question. In its solution the Court will not, as it has declared, be governed by the mere literal comprehension of the judicial clause (Wis. v. Pelican Co., *supra*), but it will look into its

"historical origin," and upon that, as well as the whole Constitution and the character of the government established by it, determine whether judicial power has been conferred in respect to the case before it.

The controversies existing between the States were well known at the time of the adoption of the Constitution, and although a tribunal had existed under the articles of the Confederation for their determination, only eight cases were brought before it, and these involved solely questions of boundary "and the like." While the language of the Articles, establishing such tribunal, was even more comprehensive in its terms than the judicial clause of the Constitution, it was never suggested that it conferred jurisdiction to compel the payment of the public obligations of a State. It was thoroughly understood, and we may say, it is now so understood, that these rested entirely upon moral sanction and the good faith of the States.

This consensus of opinion does not, we most respectfully submit, rest upon the mere narrow technical ground as to who may be parties to suits, as it is well settled that a State may, in some cases, be sued by another State. *The question is one of far higher eminence, as it involves the inquiry whether the several States composing the Union granted to the judicial department of the Federal government such an extraordinary power as is claimed in the present case.*

There are certain general principles underlying this government which, we contend, forbids such a construction. We take it to be well established by the decisions of this Court that the respective States of the Union are supreme and sovereign except

as to those powers delegated to the government of the United States and those powers which by the Constitution they are prohibited from exercising.

In the great case of Texas v. White (7 Wall., 700), this Court said:

> "And we have already had occasion to remark at this term that the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence, and that without the States in the Union, there could be no such political body as the United States. Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their Union under the Constitution, but it may not be unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

These brave, noble words, spoken at a time when the passions and prejudices engendered by the Civil War were still rife, demonstrated to the world that neither that war, nor those passions and prejudices could turn this great tribunal from a just conception of the character of the government established by our forefathers. It stood like a rock in the midst of an angry, turbulent sea, and the storm subsided before its calm, immovable attitude.

In Pennoyer v. Neff (95 U. S., 714), it is said:

> "But, except as restrained and limited by that instrument (the Constitution), they possess and exer-

cise the authority of independent States, and the principles of public law to which we have referred, apply to them."

In Lane v. Oregon (74 U. S., 71), the Court said:

"To them (the States) nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the National government are reserved."

In Martin v. Hunter (1 Wheat., 325), Justice Story, speaking for the Court, said:

"It is perfectly clear that the sovereign power vested in the State governments by their respective Constitutions remain unaltered and unimpaired, except so far as they were granted to the government of the United States. (He refers to the words of the Tenth Amendment in confirmation.) The government, then, of the United States can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given or given by necessary implication."

In Buckner v. Findley (2 Peters, 586), the Court said through Justice Washington:

"In all other respects (that is, all other than National), the States are necessarily foreign to and independent of each other. Their Constitutions and form of government being, although republican, altogether different, as are their laws and constitutions."

See also Cooley, Constl. Lim., 29.

Mr. Hamilton said:

"The State governments would clearly retain all the rights of sovereignty which they before had, and which were not by that act (the Constitution) *exclusively* delegated to the United States." Federalist XXXII.

Mr. Madison said:

"The proposed government can not be deemed a National one, since its jurisdiction extends to certain enumerated objects and leaves to the several States a residuary and inviolable sovereignty over all other objects."

Federalist.

"The States," says Prof. Woodrow Wilson," are not administrative divisions but consistent members of the Union, co-ordinate with the Union in their powers, in no sense subject in their appropriate spheres. * * The States still carry by far the greater part of the weight of the governing function, still constitute the ordinary fountains of justice and of legal right, still stand nearest the people in the regulation of all their social and legal relationships.* * * They are the chief creators of law among us. They are the chief constituent units of our political system, not only, but are self-directing units." (The State, 469.)

It would seem idle to multiply authorities in support of the general principles above mentioned. From these, it appears that in all matters not delegated to the general government, the States are sovereign, and as said in Texas v. White (*supra*), "endowed with all the functions essential to separate and independent existence." This being so, it is proper to inquire into some of the attributes of this sovereignty and the nature of some of its essential functions. This, we think, is easily answered, so far as this case is concerned, by the statement of the generally recognized proposition, that a State has exclusive control of all matters of internal regulation, including the power of taxation, the administration of its fiscal affairs and the possession and management of its property and the revenues therefrom.

These are political powers of a State, and upon the States

devolve all the duties of the sovereign and of "separate and independent existence;" such as to provide for the protection, health, liberties and education of its people, the support of its charitable and other public institutions, and for the expenses necessary for its general government, and we may add, to its very existence as a political body.

In Mayor of N. Y. v. Miln (11 Peters, 102) the Court said:

> "But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: that a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare by any and every act of legislation which it may deem to be conducive to these, where the power over the particular subject, or the manner of the exercise is not surrendered or restrained in the manner just stated." (See also License Cases, 5 How., 588.)

Considering then that a State, except as to powers granted to the Federal government, is sovereign and "endowed with all the functions essential to separate and independent existence," and that its "bounden and solemn duty" is to exercise such essential functions, it must follow, we think, that to it belongs the chief, if not the chiefest attribute of sovereignty, that is to say, its immunity from any judicial power as to the settlement of its public obligations. This is a principle of public and inter-

national law too well established, it would seem, to require the citation of authority. In U. S. v. Guthrie (17 How., 284), the Court said:

> "It would occur to every mind that a treasury not fenced around by fixed and established modes of administration, but which can be made subject to any number of demands, asserted and sustained, through the undefined and undefinable discretion of Courts, would constitute a feeble and inadequate provision for the great and inevitable necessities of the nation."

And these observations are equally applicable to suits against property, although there are liens upon it, as well as against the government directly. In Belknap v. Schild, 161 U. S., 10, the Court said: "As justly observed by the learned Judge who tried this case, there is no distinction between suits against the government directly and suits against its property. *The Siren*, 7 Wall., 152." (See also *Stanly v. Schwalby*, 147 U. S., 508.)

Were it otherwise, and the revenues and property of a State could at any time be controlled or taken from its possession by the process of a Court, *and in defiance of its legislative direction, as in the present instance*, it is obvious that its power to exercise "the functions essential to separate and independent existence" and to perform its paramount duties to its citizens, might be utterly destroyed.

Did our forefathers understand that they were granting such a power to the general government? Can it be conceived, in view of the jealous eyes with which they looked upon every grant of power, that they intended to concede one which would strip them of what may be confidently asserted is the chief and vital function of the sovereignty which they were so carefully

guarding, and reduce the States to the condition which counties sustain in relation to their several State governments? Can it be that such a grant was made or intended to be made in the six indefinite and still undefined words of the judicial clause of the Constitution—"to controversies between two or more States?" Undoubtedly they intended to confer jurisdiction in boundary and like cases as to which there had been and still existed differences between the States, and they could well have conceived of others respecting territory or diversion of public waters of a State and the like under the authority of State action. In other words, those differences that might directly arise between the States as States and as incident to their sovereignty. But as we have said, it is difficult to believe that this judicial clause was intended to grant a power which could destroy the functions "so essential to separate and independent existence," which this Court declared in Texas v. White (*supra*) remained with the States.

This provision of the Constitution must, as the Court has said, be interpreted in the light of the extraordinary conditions existing prior to, and at the time of its adoption, and the peculiar government to be established. The division of sovereignty by the concession of a part of it to a general government for the common welfare presented most serious and difficult problems, and occasioned at times very grave and obstinate differences of opinion, which, but for patriotic concessions on the part of the members of the Convention and of the various States, would have prevented the adoption of the Constitution. It was in this spirit that jurisdiction was given to this Court of controversies

between two or more States, the great purpose being to preserve the peaceful and harmonious working in the same sphere of action of two governments growing out of and founded upon such divided sovereignty. It was to *allay* controversies that might *necessarily* arise and not to encourage and authorize the creation of those founded upon no necessity or public policy and which would destroy the very peace and harmony which it was sought to maintain.

Surely no public policy can be subserved by assuming jurisdiction in the present suit and metamorphosizing these unenforcible obligations into the dignity of "controversies between two or more States" at the instance of the voluntary assignee of individuals. Where is the "absolute necessity" of so construing the Constitution as to make such demands justiciable and to enable States to become traffickers in the bonds of their sister States, and, as in this instance, *traffickers* in the supposed jurisdiction with Wall Street brokers? What a seemly spectacle does all this present, and to what inevitable evils must it lead; not the least among which is the opportunity afforded for fraud and fraudulent evasion of the Eleventh Amendment! What possible moral claim has the complainant? She gave nothing for these bonds, and it is plain that she is lending herself to the individual bondholders. She never informed the defendant of their acquisition by her and made no effort to "accommodate" the matter, the first the defendant ever having heard of the assignment being a newspaper report that she had moved for leave to file this bill. It evidently shows that the assignment was made for the purpose of a *suit*, and that no accommodation

would have answered the purpose of the assignors. And here it may be pertinent to quote the language of the Court in *Louisiana v. Texas* (*supra*): "It is difficult to conceive of a direct issue between two States where no effort at accommodation has been made." No reason can be given why any claim, liquidated or unliquidated, however small in amount, may not, by the assignment of the individual owner, become the subject of a "controversy between two or more States," or perhaps between a foreign country and a State. The language of the Constitution, ("between a State or the citizens thereof and foreign States, citizens or subjects"), would seem to authorize the latter proposition, if such claims could become the subject of a "controversy" within the meaning of the judicial clause.

As we have urged, the assumption of jurisdiction in this case involves necessarily a grant of power and such a grant as is wholly inconsistent with the possession of "all the functions essential to separate and independent existence" as a State.

That such a grant was never intended is not only, we think, apparent because of its inconsistency with the functions of independent government remaining in the States, but is manifest from the expressions of the fathers of the Constitution, and of distinguished statesmen, as well as jurists, both before and after its adoption.

In the Virginia Convention, John Marshall used some general expressions which go far beyond what is necessary for the defendant in this suit.

> "I hope (he said) that no gentleman will think that a State will be called to the bar of a Federal

Court. * * * it is not rational to suppose that the sovereign power should be dragged before a Court."

True, he was speaking in reference to the suits by citizens against a State, but the language is too general to be confined to such cases alone.

In discussing the judicial clause, Hamilton said:

"The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article on taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us that there is no color to pretend that the State government would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from constraint, but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign and have no pretentions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident it could not be done without waging war against the contracting State; and to ascribe to the Federal Courts, by a mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence would be altogether forced and unwarranted." Federalist.

Again, in his report in 1795, this same great authority says:

"Public debt can scarcely, in legal phrase, be defined either as property in possession or in action. It is evidently not the first 'till it is reduced to payment. To be the second would suppose a legal power to com-

> pel payment by suit. Does such a power exist? The true definition is, a property subsisting in the faith of the government. Its essence is promise. Its definite value depends upon the reliance that the promise will be definitely fulfilled."

This language is unmistakable and fully sustains us in saying that no such power was granted and cannot be implied from the judicial clause. Mr. Lincoln once said:

> "I do not mean to say that we are bound to follow implicitly in whatever our fathers did: to do so would be to discard all the lights of current experience—to reject all progress—all improvement. What I do say is that if we would supplant the opinions and policy of our fathers in any case, we should do so upon evidence so conclusive and arguments so clear that even the great authority, fairly considered and weighed, can not stand."

In Cohens v. Va. (6 Wheat., 266) this Court said:

> "Great weight has always been attached, and very rightly attached, to contemporaneous exposition. * * * The opinion of the Federalist has always been considered as of great authority. It is a complete commentary on our Constitution, and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank: and the part two of its authors performed in framing the Constitution, put it very much in their power to explain the views with which it was framed."

So far from any argument having been advanced to the contrary, the views of Hamilton and the fathers upon this subject have been generally accepted. Thus, no less a personage

than Daniel Webster said, in an opinion given to Barring Bros. (Works VI, 539):

> "It has been said that the State can not be sued on these (State) bonds. But neither could the United States be sued, nor, as I suppose, the crown of England in a like case. Nor would the power of suing give to the creditors, probably, any substantial additional security. The solemn obligations of a government, arising on its own acknowledged bond, would not be enhanced by a judgment rendered on such bond. If it either could not or would not make provision for paying the bond, it is not probable that it could or would make provision for satisfying the judgment."
>
> And in another part of the opinion he says "that the security for State loans is the plighted faith of the State, as a political community. It rests on the same basis as other contracts made with established governments, the same basis, for example, as loans made to the United States under the authority of Congress—the good faith of the government, making the loan and its ability to fulfill its engagements."

See, also the statement of Chief Justice Taney in 20 How., 530, cited in the general brief, in which he declares that the holders of such obligations must "rely altogether on the sense of justice and good faith of the State."

Even Edmund Randolph, in pleading for judgment in Chisholm v. Georgia, doubted the power of the Court to enforce the judgment.

> "What (he said) if the State is resolute to oppose the execution. This would be an awful question, indeed! He to whose lot it should fall to solve it would be impelled to invoke the god of wisdom to illuminate his decision."

This difficulty of judicial enforcement was still apprehended in New York v. Louisiana (*supra*), although nominally one State was suing another, as we find the complainant's counsel (the same as in this suit) saying in his brief (see Book 27, page 637, L. Ed.) that—

> "None of the difficulties as to execution of any decree passed herein that were apprehended in the early cases (*Chisholm v. Ga.*) can here exist. The decree will go against the individual defendants," meaning the Governor, Treasurer and others who were also parties. There are no such defendants here, but only the State, and it is against the State directly that any decree in this suit is to be enforced.

In Cronch v. Cr. Fonc., L. R., 8, 2 B., 384, Blackburn, J., says:

> "Foreign and colonial governments frequently create a public debt, the title to portions of which is made to depend on its possession of bonds expressed to be payable to bearer or holders. There can hardly be said, properly, to be any right of action on such instruments at all, though the holder has a claim on the government."

The French jurists say:

> "When the liquidation of a demand against the State is made for the creditor, payment is not thereby assured. The creditor can not coerce payment executively, as in the case of private debtors. If the minister asserts that he has no money, or that the appropriation is exhausted, the creditors must wait until the government supplies the requisite resources. It results that the creditor is at the mercy of the government for this payment. But we must not forget that the government represents the public probity, and that its high mission and weighty responsibilities afford

guaranties which seem to satisfy creditors as well as society itself."

Dalloz Jur. Gen. Verbo. Tresor. Pub., Nos. 383, 384.

Dufour, Droit, Adm't, 4, pages 629, 630.

3 Proudhon Dom. de Prop., No. 826.

"The nature of things opposes the opinion that the judicial tribunals should be competent to determine that the government is a debtor."

3 Proudhon Dom. de Prop., No. 826, pages 67-70.

"The history of our country shows that the government has habitually determined the claims to be adjusted; the medium of payment, and the persons to be paid, Confederations, Union and States have exercised their sovereign rights."

Hamilton's Report in 1792 and 1795.

2 Cong. Annals, page 1792.

3 Cong. Annals, page 1362.

2 Pitkin Civil Hist., 336-342.

3 Writings Gallatin, 121, 123, 143.

Extracts from brief of Judge Campbell in N. Y. v. New Hampshire.

Professor Ordronaux, in his work on Constitutional Legislation (283), says:

"The question of repudiation resides with the political department of the State, over which the judiciary can exercise no control."

The question before the Court, we contend, is practically decided by the principles declared in Hans v. Louisiana (*supra*).

The letter of the Constitution was appealed to in that case, as well as in this and in the case of Chisholm v. Georgia (*supra*). It was urged that it was a case "arising under the Constitution or laws of the United States," and therefore within the language of the Constitution authorizing a citizen to sue his own State. In denying the jurisdiction the Court said "It was an attempt to strain the Constitution and the law to a construction never imagined or dreamed of," and based its conclusion upon the dissenting opinion of Justice Iredell in Chisholm's case and the views of Hamilton and other statesmen and jurists, which we have quoted. After quoting from these, and especially the language of Mr. Hamilton in full, the Court said: "It seems to us that the views of those great advocates and defenders of the Constitution were most sensible and just, and they apply equally to the present case as to that (Chisholm's case), then under discussion." The Court also, in quoting the letter of Mr. Webster to Baring Bros. (*supra*), said: "Mr. Webster stated the law with precision in his letter to Baring Bros." Referring to Chisholm's case, the Court said:

> "It was argued by the opponents of the Constitution that this clause would authorize jurisdiction to be given to the Federal Courts to entertain suits against a State brought by citizens of another State, or of a foreign State. Adhering to the mere letter, it might be so, and so, in fact, the Supreme Court held in *Chisholm v. Georgia;* but looking at the subject as Hamilton did, and as Mr. Justice Iredell did, in the light of history and experience and the established order of things, the views of the latter were clearly right, as the people of the United States, in their sovereign capacity, subsequently decided."

This, we submit, overrules the principle of the decision in Chisholm's case. How did Mr. Justice Iredell look at it? *The rationale* of his opinion is thus stated by the Court:

> "Justice Iredell, on the contrary, contended that it was not the intention to create new and unheard of remedies, by subjecting sovereign States to actions at the suit of individuals (which he conclusively shows was never done before), but only, by proper legislation, to invest the Federal Courts with jurisdiction to hear and determine controversies and cases between the parties designated, that were properly susceptible to litigation in the Courts."

And further on the Court proceeds:

> "The truth is, the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. Some things, undoubtedly, were made justiciable which were not known as such by the common law; such, for example, as controversies between the States as to boundary lines, and other questions admitting of judicial solution. * * * Of other controversies between a State and another State, or its citizens, which, upon settled principles of public law, are not subjects of judicial cognizance, this Court has often declined to take jurisdiction. See *Wisconsin v. Pelican Co.*, 127 U. S., 265."

Was not a suit by one State against another to enforce public obligations equally as "new" and as "unheard of" a remedy as the suit of an individual against a State? Was it not equally "unknown to the law and forbidden by the law"? Was it not contrary to "the principles of public law" and contrary to "history, experience and the established order of things"?

Would not the reserved sovereignty of the States, to regulate its fiscal and other internal affairs, and to control its own property, be invaded by a suit in the one case as well as in the other?

The answer is to be found in the words of Hamilton, Webster and other great men referred to in the opinion, to the effect that contracts of this character are only binding on the conscience of the sovereign, and that a State can not be deprived of its "pre-existing right" of determining and settling its debts by judicial or other constraint.

These views, as we have seen, have been stamped with the seal of approval by this Court in Hans v. Louisiana; indeed, they constitute the principles of decision in that important case.

It must, we think, be manifest that this very generally recognized proposition, that public obligations rest alone upon the good faith of the State, is founded upon the principle that their payment can not be judicially enforced; and that this immunity from such judicial coercion, which is also generally recognized, grows out of the inherent character of every political body endowed with and exercising "all the functions essential to independent and separate existence." Inasmuch as it is invested with such sovereign attributes and charged with their corresponding duties, it has necessarily complete control and direction of all of its property and revenues, and, in this country, such control is exercised by the *political department of the State alone.* Such control can not exist in the presence of judicial interference and coercion; and as such control is based upon the fundamental principles of this government, and so declared by this Court, and as there is no express

grant of such a conflicting judicial power, the conclusion would seem to be irresistable that its existence, as Hamilton said, can not be "implied" from a mere grant of "a limited and special jurisdiction" over admittedly undefined controversies. It is not at all surprising, therefore, that the Court said in Wisconsin v. Pelican (*supra*):

> "This Court has declined to take jurisdiction of suits between States to compel the performance of obligations, which, if the States had been independent nations, could not have been enforced judicially, but only through the political departments of their governments."

Thus, in *Kentucky v. Denison* (24 How., 66), this Court, while holding that the case was a controversy between two States, decided that it had no authority to grant the writ. The Court further cited Cherokee Nation v. Ga. (5 Peters, 1), in which, after denying its jurisdiction as to one point, it said, through Marshall, C. J., that—

> "That part of the bill which respects the land occupied by the Indians, and prays the aid of the Court to protect their possessions, may be more doubtful. The mere question of right might, perhaps, be decided by this Court in a proper case with proper parties. But the Court is asked to do more than decide on the title. The bill requires us to control the Legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the Court may well be questioned. It savors too much of the exercise of political power to be within the province of the judicial department."

These cases clearly show that whatever may be the judicial power, it does not extend to, but is limited by, and subordinated to the political powers of a State.

In Wisconsin v. Pelican (*supra*), the Court further says:

> "The grant is of 'judicial power,' and was not intended to confer upon the Courts of the United States jurisdiction of a suit or prosecution by one State of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of other States at all."

The numerous authorities, as well as opinions of statesmen and jurists, which we have cited, would seem to be conclusive that the present case falls within the principles above stated. The distinction between obligations between individuals, and between a State and individuals, and the serious consequences of the judicial enforcement of the latter class by an invasion of the political and executive functions of a State, are pointed out in *Ex parte* Ayers, 123 U. S., 443, extracts from which appear in the general brief.

As is said in the general brief, in speaking of the judicial clause:

> "Was it not rather an extension of jurisdiction over parties previously not subject to judicial action, rather than an extension of judicial power over subject matters which were previously beyond the competency of the Courts to deal with?" And, as Mr. Hamilton said, "In destruction of a pre-existing right of the State governments."

In none of the cases where the distinction is drawn between individuals justifying under an unconstitutional law and the acts of agents or officers of a State, where the State is substan-

tially the party in interest, is there any decision that if, in the latter class, the State could have been made a party, affirmative relief could be granted in order to compel it to perform its public obligations. See review of cases in Pennoyer v. McConnaughty (140 U. S., 1).

On the contrary, as we have seen, the expressions of the Court have been entirely the other way; and in this connection we refer to the opinion of the Court in Christian v. Atlantic and N. C. R. R. (133 U. S., 233), in which it is laid down as one of the general principles applicable to suits against a State, *"that its property in the possession of its own officers and agents cannot be reached by its creditors by means of judicial process."* It is true that the State was not a party, and upon that principle, the juridiction could not be entertained, but even if it had been a party, the other principle we have quoted, and which we have endeavored to maintain in this discussion, absolutely forbids the judicial enforcement of the public obligations of a State. It was very natural that the Court should have mentioned this principle, as we have seen that it was founded upon the very nature and structure of the government, and involves the most essential function to the independent and separate existence of a political body.

The State of North Carolina is in the complete possession of the property which is sought to be subjected in the present suit. Its possession is like that of the State in Christian's case (*supra*). It owns a majority of the stock in the North Carolina Railroad Company, and absolutely controls the railroad through its proxies, and the physical possession thereof through its

agents or lessees. As was said in Christian's case, "No stockholder of any company ever had more perfect possession and ownership of his stock than the State of North Carolina to the stock in question." The object of this suit is the same as was explained in Christian's case—"to get possession of her property; to sequester her dividends (if any there be), and to compel the payment of them to the complainants; to seize and sell her stock in the railroad, stock of which she is in the sole possession."

This possession, as we have said, is in the political department of the State, and the dividends are a part of its public revenue in the hands of its Treasurer, who can administer it only under the direction of the Legislature.

The State of North Carolina, for reasons which appear to it to be just and proper, *has forbidden the Treasurer to satisfy the demands of the complainant and its allies in this suit.* It has forbidden that any of its property shall be so applied, and this it has done in the exercise of a discretion which is vested in it as a political body, "endowed with all the functions essential to separate and independent existence." For the reasons we have advanced, and the authorities cited, we insist that this discretion cannot be controlled or coerced by the judicial power of this or any other Court. If no power exists to enforce a decree, then the Court, we respectfully submit, should refuse to entertain the jurisdiction.

We are conscious that in this discussion we have referred to general principles of the government and opinions of "the fathers," publicists and statesmen with which this Court is entirely familiar. In doing this, however, we have but followed

the example of this august tribunal when it passes upon great questions of constitutional law; and it does this, we believe, because it is only by resorting to such sources of information—we may almost say of inspiration—that the character of this government, as designed and fashioned by its authors, can be rightly understood and preserved.

The proposition upon which this suit is based, is one, we respectfully submit, which challenges a review of the history and fundamental principles of the Constitution, and which affects not only the defendant State, but all of the States composing the Union.

II.

"The evident purpose of the amendment, so promptly prepared and finally adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be sued, and, in our opinion, one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens," or, we may add, to the citizens of other States.

Such is the language of this Court in *New Hampshire v. Louisiana* (108 U. S., 76); and we contend that the pleadings and the testimony in this suit bring it within the principle thus declared. The creditors in the above mentioned suit attempted to evade the Eleventh Amendment by a more open and direct

course, that is, by assigning their claims to the complainant State, under statutory sanction, for the avowed purpose of collection for their own benefit. Seeing that this method would not avail them, the creditors in the present suit have concocted a scheme which, under the guise of a gift to the complainant State, is to accomplish the same result. In consideration of what may be justly called a fee, and a small one, too, (as it will very probably be diminished by counsel fees and other expenses, see Act of South Dakota, page 41), the creditors have, in effect, employed the complainant State to commence and prosecute this suit in order that all of the outstanding bonds of the class sued upon, and which are owned or controlled by Schafer Bros., may be drawn within the jurisdiction of this Court on the ground that the holders thereof are necessary parties to a decree of foreclosure. Although essentially plaintiffs in interest, and should be arranged as such (see general brief), they could not, under the judicial clause of the Constitution, be joined as complainants with the complaining State; and hence *they have procured themselves to be sued as co-defendants.* If, in pursuance of this arrangement, they can succeed in collecting their claims, they will succeed in doing precisely what is prohibited by the Eleventh Amendment. If we have established by the testimony that such was the purpose of the gift, and that this suit is instituted in order to carry out such purpose, then we respectfully submit that it is an attempted fraud upon the jurisdiction of this Court and an evasion of the Eleventh Amendment. It may be that counsel will argue that the complainant State has the legal title to the ten bonds sued upon, and that no

matter what were the purposes of the assignment, the assignors can not dispute such title, and therefore she can sue upon it. Granting all this to be true, for the purposes of the argument, so far as the assignors are concerned, it is equally true that she can not use, or allow to be used, such legal title as a part of a scheme to perpetrate a fraud upon the jurisdiction and to evade a great constitutional provision.

Even if, in the light of the testimony, it were possible to conceive that, in accepting these bonds, she was innocent of any knowledge or suspicion of the fraudulent purpose, it would be immaterial, as she is the immediate assignee of parties having such fraudulent purpose, and, being a volunteer, is affected therewith. Acquiring the title in this way she can not be permitted to become even a mere passive instrumentality in the violation of the amendment.

In discussing the testimony we desire to direct the attention of the Court to the fact that about the first of March, 1901 (page 89), the Schafer Bros., brokers in New York, presented a memorial to the General Assembly of North Carolina, asking for the settlement of these second class "mortgage" bonds; and that from the said memorial it appears (page 151) that they owned and controlled two hundred and forty-two of the same, they owning a large majority in their own right and the remainder as "trustee" for others. These were about all of that class of bonds outstanding, the other holders having long since funded their bonds under the Act of 1879 (page 129). It also appears from the testimony that not only before the presentation of the said memorial, but ever since, the Schafer Bros. con-

tinued to own and control all of these bonds, and that Simon Rothschilds, who is made a defendant as a representative of the class of first mortgage bondholders, and who also owns sixteen of the second "mortgage" bonds, has surrendered complete control of any part he was to play in this suit to Schafer Bros. He says that his bonds have been in their hands for collection for ten years; that he has never agreed to pay counsel fees in this suit; that he "left all that in Schafer's action" (page 56); that he does not recollect that he ever read the bill of complaint, and that all he did when he was served with process was to see Simon Schafer (page 57); that he consulted no counsel, and that Schafer is to attend to his interest in these and other bonds (page 58.) To the same effect is the testimony of Charles Salter, who is made a defendant as a representative of the second "mortgage" bonds and who filed an answer in this suit. He says, "This matter I put with Schafer Bros. some years ago and left it to them," "entirely with them" (p. 61); that Gov. Russell, he presumes, prepared the answer; that Schafer Bros. suggested his employment; that he has paid no fees, that Governor Russell was not employed directly by him, "but by the Schafers," whose attorney he was. That the Schafers employed counsel and *"they are managing this whole business."* (Pages 62, 63.)

Thus it appears that Schafer Bros. entirely control the other two defendants in this suit, and also all that has been done in the inception and furtherance of this attempted traffic in jurisdiction has been done at their instance and under their direction. Their acts and statements, and the acts and statements of their counsel, therefore, are binding upon those two defend-

ants. At the time the memorial was presented, it appears that Mr. Ricaud, of New York, Mr. Busbee and Senator Butler, of North Carolina, were counsel for Schafer Bros. in respect to the collection of these bonds, though the memorial was signed only by Mr. Busbee, Senator Butler having been employed in January, 1901 (page 181), and Mr. Ricaud sometime in 1900 (page 103.) The memorial having failed, nothing more was heard about these bonds until sometime in October, 1901, when application for leave to file this bill was made by the State of South Dakota. This is the first time any one in North Carolina, except complainant's counsel, ever heard that the complainant had acquired these bonds. Governor Aycock (page 93) says that his first information came from the newspaper reports of the said application and that no demand, or attempt to negotiate was made. Indeed, the Governor of South Dakota tells us that he gave no notice of the assignment and that he made no demand or attempt to negotiate, but simply turned the bonds over to the legal department for collection. (Page 37.) Whether such conduct "comports with the dignity and gravity" and the comity that should characterize the States of this Union in dealing with each other depends, we suppose, upon how far the "spirit of commercialism" has progressed in this country. It is all the more remarkable, too, when it is considered that this is the first instance we have in the history of this country, either before or after the adoption of the Constitution, of one State acquiring the public obligations of another State and attempting to enforce them for its own alleged benefit by the process of this or any other tribunal.

The explanation of this breach of comity, as abundantly appears from the testimony, is, that it was not intended to give the defendant an opportunity to negotiate, or to come to an "accommodation." What the assignors wanted was *a suit*, and the assignee shows by its extraordinary conduct, that it *was willing to bring it for them.*

The bill, when read with the answer of Chas. Salter, would seem alone sufficient to indicate the purpose of the assignment and the object of the suit. When, however, the testimony is considered in connection with these pleadings, we think that all doubt must disappear. In the first place, what an unusual thing it is that such a gift should be made at all; and especially by brokers living in New York, and to such a distant State as South Dakota! Simon Schafer had no "financial interest" in that State. "He was born and reared in New York City;" nor was he "particularly interested" in South Dakota, nor had he any "children out there," nor was "he interested in the schooling of any children there" (testimony of Samuel Schafer, page 73). So strange did it seem to this witness that he tells us that when he heard of the gift he was "angry" with his brother, that is, (he explains), he did not approve of it. He became reconciled, however, when his brother told him that he *"thought it would ultimately inure to his benefit, some of his bonds."* The witness also stated that Simon Schafer gave his own bonds, but that they both owned jointly about $140,000 of the same kind. (Page 74.) We have here an express declaration of the purpose of the gift. How could the gift possibly "inure" to the benefit of their bonds unless a suit of this kind was to be instituted? Now,

where did Simon Schafer get this idea? He is dead, and we therefore, had no opportunity of examining him. But enough appears to show that it was the result of legal advice. Although Governor Russell, on his examination, declined to answer questions bearing on the purpose of the assignment, on the ground of professional privilege, his testimony shows that Mr. Busbee and Mr. Ricaud were talking of the rights of sovereigns to bring suits, etc. (page 105). The witness was asked:

> "Did you have any information from any source whatever, from any parties whatever, prior to the time you were employed as counsel for any of the holders of the second mortgage bonds, that it was in contemplation by any parties or persons whatever to so place a portion of the said mortgage bonds as to enable some State to bring action, or a suit in the Supreme Court of the United States, against the State of North Carolina to recover the said second mortgage bonds?" *Answer*: "Oh, I might have heard some such talk; the matter was discussed. I remember having some talk with Mr. Busbee about it. Well, I guess that was in March, too, or April, 1901." *Question:* "Do you know at whose suggestion a bill was introduced in the Legislature of South Dakota in 1901, to enable that State to accept or receive a gift of any of the second mortgage bonds, or of any bonds, and what the purpose of that bill was?" *Answer:* "Oh, I think I heard Colonel Stewart, of South Dakota, and possibly Mr. Burke, say that they had the bill introduced, or that one of them introduced it, or something of that sort." *Question:* "I will ask you if you did not at that time learn that the chief purpose of that act was with a view to receive from the Schafers a donation of the bonds now in suit, and with a view of bringing a suit against North Carolina to recover?" *Answer:* "Oh, it is not improbable that

such an inference was made; it may be that such conclusion was inferential from what they said." *Question:* "Do you know, Governor, that the bill was going to be introduced in the Legislature of South Dakota before it was done?" *Answer:* "I think I did hear it mentioned." *Question:* "Did you know that Simon Schafer was going to donate ten bonds to the State under that bill? *Answer:* "Did I? No, sir; I did not know he was going to do it, and, indeed, I am quite sure, or I have reason to believe at least, that he was not willing to do it until about March, 1901." *Question:* "Well, did you know why Simon Schafer was not willing to do it before that date?" *Answer:* "Well, yes. I knew, I know what he said, but I shall not state what he said for reasons already given." (Page 108.)

The witness also had a conversation with Senator Butler about a suit to recover these bonds, and it appears in evidence that Senator Butler suggested to Senator Pettigrew to have the Act passed, and that Mr. Burke had it done through Colonel Stewart (page 180). It was passed March 11, 1901. This witness further testified that it may have been, though he hardly thinks so, that Mr. Wheeler H. Peckham (who, now appears of record for the State of South Dakota), was employed or consulted at the suggestion of Mr. Ricaud, the attorney of the Schafers. The witness, continuing, said:

"I will further state, since thinking a little further about one of your former questions, that my impression is that Mr. Peckham was employed or consulted with regard to these second mortgage bonds sometime in March, 1901." (Page 104.)

Now, why was Mr. Peckham employed or consulted about this matter in March, 1901, and who was it that consulted him?

It could not have been the State of South Dakota, as she did not acquire the bonds until the following September. It could have been none other than the Schafers, through their attorney; and this is not only manifest from all the circumstances of the case, but from the testimony, upon further consideration, of Governor Russell. Why, we again ask, this consultation with Mr. Peckham, the distinguished counsel who appeared in *New Hampshire v. Louisiana* (108 U. S., 76), and who had presumably sounded all the "depths and shoals" of "the original jurisdiction"? Why all this solicitude on the part of Schafer Bros. and their attorneys? Why all this talk about the passing of an act *with a view of a suit being brought* against the State of North Carolina? Why all this very careful preparation, if Simon Schafer, in the goodness of his heart, simply wished to give ten of his bonds to South Dakota? Donors do not generally put themselves to all this trouble and expense if no more than a mere gift is intended. They would naturally leave all matters concerning the simple acceptance of the intended gift to the donee. How is it possible to account for all this except upon the theory that the gift was made for the purpose we have charged?

Not the least remarkable feature of this suit is the means by which South Dakota was reached and made a party to this transaction. Some State must be found to institute a suit, and how convenient was it for Senator Butler to find it through his friend, Senator Pettigrew, of South Dakota. In 1900, Senator Butler visited South Dakota to assist his friend in his campaign for re-election. (Page 180.) He says he became interested in the condition of the University and other State institutions,

and afterwards, in January or February, 1901, he told Senator Pettigrew that he thought he "knew where he could get a donation," and the passage of the Act was again suggested, it having been talked about previously by them. At that time, he says, he did not state whether the donation would "be bonds or what kind of bonds." He then voluntarily proceeds as follows:

> "If I at a later period did discuss North Carolina bonds, and led him to believe that I could be instrumental in securing a donation of North Carolina State bonds, I would decline to give the information, because I could only have had such information from a consultation and a transaction between attorney and client, which, I understand, is privileged."

He says the client was Schafer Bros, and that he was employed by them in January, 1901. (Page 181.) Can there be a doubt as to this matter having been arranged by Senator Butler through his friend, Senator Pettigrew, while he was in the employment of the Schafers? Whether Senator Butler was more interested in the State institutions of South Dakota than in his clients, Schafer Bros., is a matter we leave without comment. Another remarkable thing in this transaction is the letter of Simon Schafer accompanying the gift. (Page 39.) The letter is as follows:

> "OFFICE OF SCHAFER BROS., No. 35 WALL ST.,
> "NEW YORK, *September* 10, 1901.
> "P. O. Box 2217.
> "*Hon. Charles H. Burke.*
> "DEAR SIR:—The undersigned, one of the members of the firm of Schafer Bros., has decided, after consultation with the other holders of the second mortgage

bonds issued by the State of North Carolina, to donate ten of these bonds to the State of South Dakota.

"The holders of these bonds have waited for some thirty years in the hope that the State of North Carolina would realize the justice of their claims for the payment of these bonds.

"The bonds are all now about due, beside, of course, the coupons, which amount to some one hundred and seventy per cent of the face of the bond.

"The holders of these bonds have been advised that they can not maintain a suit against the State of North Carolina on these bonds, but that such a suit can be maintained by a foreign State or by one of the United States.

"The owners of these bonds are mostly, if not entirely, persons who liberally give charity to the needy, the deserving and the unfortunate.

"These bonds can be used to great advantage by States or foreign governments; and the majority owners would prefer to use them in this way rather than take the trifle which is offered by the debtor.

"If your State should succeed in collecting these bonds, it would be the inclination of the owners of a majority of the total issue now outstanding to make additional donations to such governments as may be able to collect from the repudiating State, rather than accept the small pittance offered in settlement.

"The donors of these ten bonds would be pleased if the Legislature of South Dakota should apply the proceeds of these bonds to the State University, or to some of its asylums or other charities.

"Very respectfully,

"Signed) SIMON SCHAFER."

This letter, we submit, affords conclusive evidence of the purpose of the assignment. If Simon Schafer was giving his individual bonds, what possible reason did he have for consulting with the other bondholders of the same class? The letter

also shows that the bonds were given solely because "the holders" had been advised that they could not, but that a foreign State, or one of the United States, could maintain a suit against North Carolina.

In view of this letter and all of the circumstances in evidence, it is folly, it seems to us, to say that the State of South Dakota acquired these bonds in "due course," and that it can avail itself of all of the incidents attaching to commercial paper in the hands of a *bona fide* holder. States are not supposed to deal in such paper, as they are political bodies, and concerned only with matters of government incident to their sovereignty.

Mr. Carmen F. Randolph, in an able article (Notes "On Suits Between States," Columbia Law Review, vol. 2, No. 5, May, 1902), says:

> "Where the relation of borrower and lender exists between independent sovereigns, it is usually induced by political motives, such as strengthening an ally, or fastening a mortgage upon coveted territory: rarely does a government deal in the obligations of another merely for investment or speculation. Now, for such a relation between the States of the Union political motives are out of the question, and usually financial motives would seem to be quite as questionable as in the case of independent sovereigns."

After observing that a State is not forbidden to acquire another's bonds in due course, and may sue upon them, (although, in another place, he doubts whether their payment may be judicially enforced), he proceeds:

"But the speculative acquisition of obligations not enforceable by the persons who transfer them is not, in my opinion, 'due course'; it is not a transaction entitled to consideration at the hands of the Supreme Court."

He continues:

"But when a claim is acquired by a government only because a private claimant cannot secure its payment, a suit for its recovery should be dismissed as an attempt to evade the Eleventh Amendment."

And again:

"I can perceive no equity in a transfer of money from one State to another without real consideration, and were this (speaking of this suit) a possible transaction, private bondholders would exact substantial percentages of their bonds by threatening to throw them to States who would collect the full amount. Thus the States would be coerced contrary to the spirit of the Eleventh Amendment."

These views, sustained as they are by principle and reason, are especially applicable to this transaction.

That part of the letter which speaks of the holders of the bonds as "persons who liberally give charity to the needy, the deserving and unfortunate," will appear somewhat fantastic when considered in the light of the answer, drawn at the instance of Schafer Bros., in which, after admitting all the allegations of the bill and asserting that he and the other holders are entitled to be paid out of the proceeds of the foreclosure, *benevolently* concludes by praying that the bill be *dismissed*

"unless the Court shall decree that *all* the stock subject to the second mortgage be sold for the benefit of *all* the holders of said second mortgage bonds." (Page 28.)

Alas! what is to become of "the needy, the deserving and the unfortunate" if the Schafers and the other holders are not permitted to recover? And how, after this exhibition of generosity, can other States and *"foreign governments"* hope to realize much from the "inclination" of the holders to make "additional donations"?

Another fact to which we ask the attention of the Court appears in the testimony of the Governor of South Dakota. (Page 36.)He says that the bonds were delivered with the letter of Schafer by Mr. Burke on or about September 21, 1901, but that before that time, in an interview between him and Burke and Attorney-General Pyle, (who is dead), he heard that there was "a certain party who owned and held certain bonds issued by the State of North Carolina that he desired to donate to the State of South Dakota."

He was asked:

> *Question.* "Was any reference made during that interview with Mr. Burke—that is, the interview several weeks prior to the delivery of the bonds—in reference to the employment of counsel and the bringing of suit; and if so, what was it?"
>
> *Answer.* "I don't remember, but I think he said that he would or had talked the matter over with the Attorney-General."
>
> *Question.* "Then at the time of the delivery of these bonds you say that Colonel Stewart was the associate of the Attorney-General in regard to their collection?"
>
> *Answer.* "At that time I understood that it might be necessary to bring an action, and that Colonel Stewart had been associated with the Attorney-General in the matter."

Question. "Had Colonel Stewart been spoken to or employed by you at that time"?

Answer. "No, sir."

The Governor says he left the bonds in the office of the Attorney-General and never gave any notice to North Carolina. So it appears that several weeks prior to the delivery of the bonds private counsel had been employed to assist the Attorney-General in bringing a suit, and that he was not employed by the Governor. At whose instance, it may well be asked, was the counsel employed? This sustains us in saying that the bonds were given for the purpose of a suit. Is it not perfectly safe to conclude that they would not have been given had there been an understanding to the contrary? It is true that Mr. Burke, on his examination, stated (page 177) that he delivered the bonds without any conditions except a suggestion that the assignor hoped that the proceeds might go in aid of the State University, and the witness also stated that he knew of no reason why the State could not accept twenty-five cents on the dollar. This was objected to by the defendant State, because it was clearly a mere matter of *opinion,* the witness having already stated with great particularity *all the facts within his knowledge.* (Page 174.)

He says:

> "I never conversed with any person connected with this transaction, representing the State of North Carolina, Schafer Bros., or any bondholders, or any one else connected with or owning these bonds, prior to the commencement of this action, except as I have stated."

The exceptions are Senator Pettigrew and Colonel Stewart. Senator Pettigrew seems to have been the connecting link, either directly or through Senator Butler, with the Schafers. Senator Pettigrew never said anything to Mr. Burke about the gift being unconditional, or that the State could accept 25 cents on the dollar; nor did Colonel Stewart say so. On the contrary, Senator Pettigrew said a suit might be necessary (page 176), and Colonel Stewart's conversation related only to the act of the Legislature. The evidence objected to then is nothing but an *opinion*, and purely of a negative character. It appears that Mr. Burke was to know no more about the transaction than was necessary to perfect the transfer of the bonds and put the legal machinery in motion. All, it seems, that he knew, according to his testimony, was contained in the letter of Simon Schafer. Can it be that his *opinion* merely is to have the effect of destroying the force of the powerful array of *facts* and *circumstances* in evidence, all leading irresistibly to the conclusion that the purpose of the assignment was to evade the Eleventh Amendment of the Constitution.

Another significant fact is that these bonds were, after all, not sent to Mr. Burke by Schafer Bros., but were delivered to him by Colonel Stewart (page 173), who had already been employed to assist the Attorney-General, and who, according to the testimony of Governor Russell (page 108), had told him that he had had the act introduced in the Legislature of South Dakota.

We earnestly contend that a perusal of the testimony will abundantly show that these bonds were assigned in pursuance of a carefully prepared scheme to evade the Eleventh Amendment of the Constitution of the United States.

III.

It seems to have been supposed by Senator Butler, who at that time was the attorney for Schafer Bros., that in order to carry out this traffic in jurisdiction, it was necessary that the Legislature of South Dakota should pass a law requiring the Governor of that State to accept donations, etc. The act is as follows:

"An act to require the acceptance and collection of grants, devises, bequests, donations, and assignments to the State of South Dakota.

"*Be it Enacted by the Legislature of South Dakota:*

"SECTION 1. That whenever any grant, devise, bequest, donation, or gift or assignment of money, bonds or choses in action, or of any property, real or personal, shall be made to this State, the Governor is hereby directed to receive and accept the same, so that the right and title to the same shall pass to this State; and all such bonds, notes or choses in action, or the proceeds thereof, when collected, and all other property or thing of value, so received by the State as aforesaid, shall be reported by the Governor to the Legislature, to the end that the same may be covered into the public treasury or appropriated to the State University or the public schools, or to State charities, as may hereafter be directed by law.

"SEC. 2. Whenever it shall be necessary to protect or assert the right or title of the State to any property so received or derived as aforesaid, or to collect or to reduce into possession any bond, note, bill or chose in action, the Attorney-General is directed to take the necessary and proper proceedings and to bring suit in the name of the State in any Court of competent jurisdiction, State or Federal, and to prosecute all such suits, and is authorized to employ counsel to be asso-

ciated with him in such suits or actions, who, with him, shall fully represent the State, and shall be entitled to reasonable compensation out of the recoveries and collections in such suits and actions.

"Approved March 11, 1901."

Whether this act was passed for the purpose of compelling the Governor of South Dakota to accept these bonds, and thus relieve him of the odium of being voluntarily connected with a transaction of this character, or whether it was intended to compel him to bring suit, or whether it was supposed that *the Governor alone could not, by any act of his,* create "a controversy between two or more States," it is not for us to say. We suppose, however, that it was apprehended that the State, through its legislative department, must authorize such a transaction in order to create a "controversy between States." If such was the purpose, we contend that the efforts of these gentlemen, Senators Butler and Pettigrew and the Schafers and others, signally failed, as the act simply applies to ordinary bonds and other choses in action. If legislative sanction were necessary to create a controversy between States, it should have been *specifically* given. The Legislature could not give a general power of attorney to the Governor to create by any acts of his controversies of this high character.

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Attorney-General.

GEORGE ROUNTREE,

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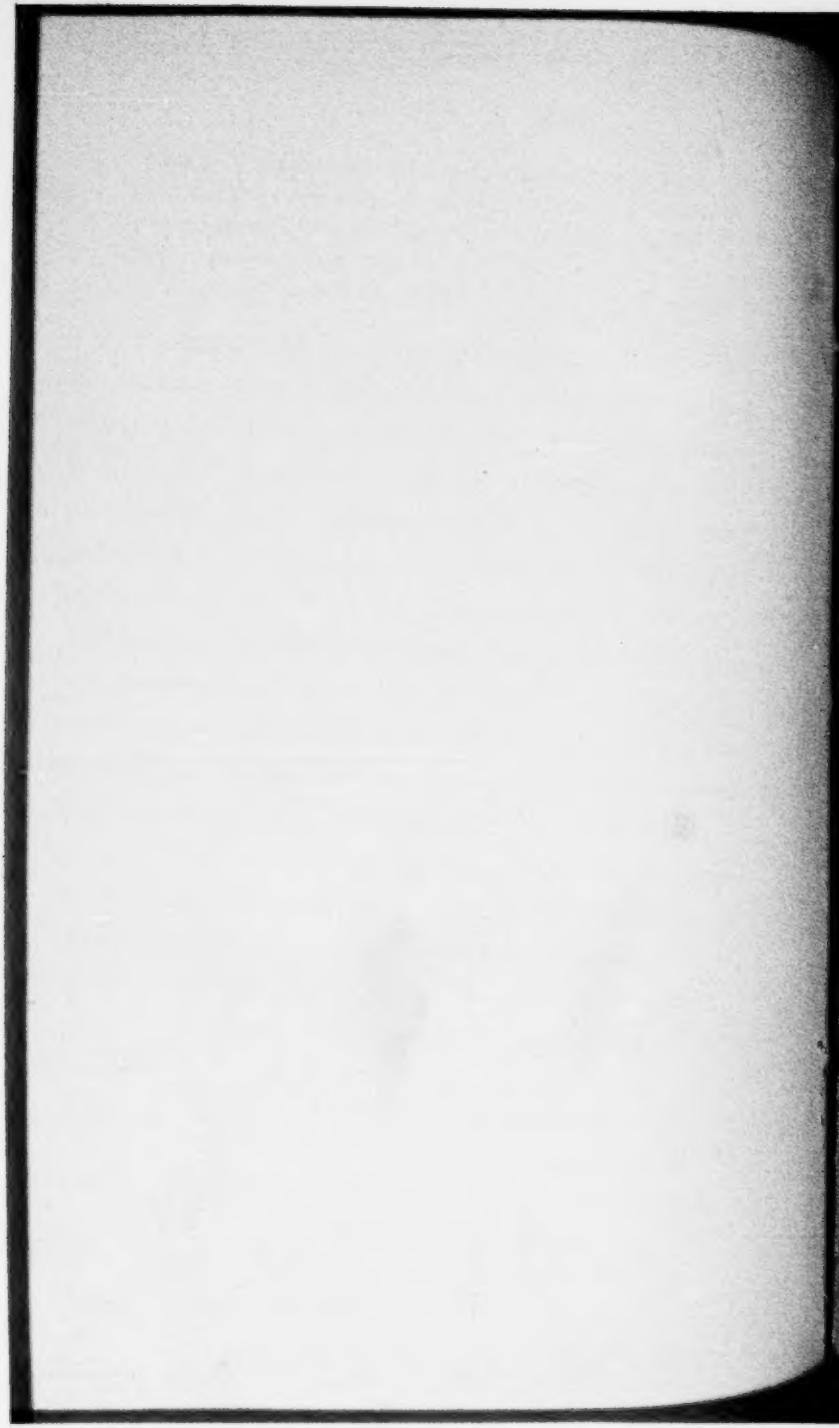
JAMES E. SHEPHERD,
Of Counsel.



Supreme Court of the United S

OCTOBER TERM, 1902.

IN EQUITY.

THE STATE OF SOUTH DAKOTA, *Complainant*,

vs.

THE STATE OF NORTH CAROLINA, CHARLES SALTER AND SIMON ROTHSCHILDS, *Defendants.*

BRIEF FOR THE STATE OF NORTH CAROLINA.

ROBERT D. GILMER, *Attorney-General*,

JAMES E. SHEPHERD,
JAMES H. MERRIMON,

GEORGE ROUNTREE, *of Counsel.*

IN THE

United States Supreme Court,

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THE STATE OF SOUTH DAKOTA, *Complainant*,

against

THE STATE OF NORTH CAROLINA, CHARLES SALTER AND SIMON ROTHSCHILDS, *Defendants*.

BRIEF FOR THE STATE OF NORTH CAROLINA.

STATEMENT OF THE CASE.

This is a suit brought by the complainant, the State of South Dakota, against the State of North Carolina and others, for the purpose of having an accounting of and adjudicating the indebtedness upon all the bonds of the State of North Carolina of the class held by South Dakota; all the bonds having a first lien on the stock of the State of North Carolina in the North Carolina Railroad Company, and to foreclose the liens upon the State's stock in the said railroad company for the purpose of paying complainant and all others holding bonds secured by such liens.

The State of North Carolina owns stock in the North Carolina Railroad Company of the par value of three millions

of dollars. There are outstanding bonds, known as the first mortgage bonds, with a lien upon said stock, amounting to the par value of about two million seven hundred and twenty-three thousand dollars. The bonds held by the State of South Dakota were of the class issued under and by virtue of an act of the General Assembly of North Carolina, entitled "An act to incorporate the Western North Carolina Railroad Company," ratified the 15th day of February, 1855, and of an act amendatory thereof, ratified the 19th day of December, 1866, entitled "An act to enhance the value of the bonds to be issued for the completion of the Western North Carolina Railroad, and for other purposes," and amounted to about two million five hundred thousand ($2,500,000) dollars, and, by their terms, fell due on July 1, 1897.

At the time these bonds were authorized and issued, no stock certificates had been issued to the State of North Carolina for her stock in the North Carolina Railroad Company, nor have any certificates ever been delivered, or set apart, or marked as mortgaged or pledged, as required by the Act of 1866.

The lien, if any, by which the bonds held by the complainant State is secured is a second mortgage lien upon the stock owned by the State of North Carolina in said railroad company.

The defendant Charles Salter is the owner of a few of the bonds of the same class as those held by the complainant, and is made defendant as representative of the private bondholders.

The defendant Simon Rothschilds is the owner of a few of the bonds secured by the first mortgage upon the State's stock in said railroad company, and is made defendant as representa-

tive of that class of bondholders who are all, so far as known, private individuals.

In 1879, the defendant, the State of North Carolina, being overwhelmed with debt, and unable to pay the interest thereon and the current expenses of the government, passed an act appointing commissioners to adjust and compromise the State debt. This was done to a large extent, and of the two million five hundred thousand ($2,500,000) dollars of bonded indebtedness similar to that held by the complainant, all but about two hundred and fifty bonds of the par value of two hundred and fifty thousand ($250,000) dollars were compromised and settled. Practically all bonds not compromised were owned, or controlled, by Simon Schafer and his brother Samuel Schafer, composing the partnership and firm of Schafer Bros., brokers, of New York City. Schafer Bros. having tried in vain, by petition to the General Assembly of North Carolina and otherwise, to secure better terms in the settlement of their bonds than those upon which the others were settled, Simon Schafer, acting through Congressman Burke, of South Dakota, made a donation of ten out of the two hundred and fifty of the bonds held and controlled by him and his brother to the State of South Dakota. He had no interest, personal or pecuniary, in said State. The assignment or transfer was made on the 21st day of September, 1901, after the maturity of the bonds, and almost immediately thereafter this suit was brought, without any demand upon or notice to the authorities of the State of North Carolina.

The defendant, the State of North Carolina, through her

counsel, did not demur to the complaint, but answered, and, in the answer, solemnly protests against the exercise of jurisdiction by this Court in this cause, and also sets up a defence upon the merits.

We will first discuss the question of jurisdiction, and then the merits.

ARGUMENT.

The Court is without jurisdiction to make any decree against the defendant, the State of North Carolina, in this cause.

It is settled law that a sovereign can not be sued in the Courts without his consent.

Belknap v. Schild, 161 U. S., 10.
The Siren, 7 Wallace, 152.
Smith v. Weguelin, L. R. 8 Eq., 198 (1869).
Briggs v. Light Boats, 11 Allen, 157.

And this rule applies to suits brought in the Federal Courts against either of the States of this Union.

Beers v. Ark., 20 How., 527, 529.
New Hampshire v. Louisiana, 108 U. S., 76.
Cunningham v. M. & B. R. R., 109 U. S., 446, 451.
Hans v. Louisiana, 134 U. S., 1.
Louisiana v. Texas, 176 U. S., 1.

It is insisted, however, that the defendant has consented to be sued in this cause, and that in two ways:

(1) By pleading to the merits.

(2) Under the terms of the Constitution, by becoming a member of this Union of States.

I.

The State of North Carolina did not consent to the exercise of jurisdiction in this cause by pleading to the merits.

Whatever may be adjudged to be the legal effect of the answer on this point, it is manifest from a reading thereof that there was no intention on the part of the representatives of the State of North Carolina to consent to this suit, but rather to show to the Court fully the purpose and object thereof as good ground for a refusal to entertain jurisdiction. The answer is a protest against the exercise of jurisdiction, and an attempt to show that the action is a cunningly devised scheme to evade the letter of the prohibition of the Eleventh Amendment, while accomplishing a result plainly forbidden by it.

While it is a general rule that want of jurisdiction as to the parties is waived by voluntary appearance or a failure to object at the proper time (cases collected in *12 Enc. of Plead. and Prac.*, page 191); this is not true of a want of jurisdiction as to the subject matter (*Ibid*, pages 127, 188, *et seq.*).

That the Court will carefully consider and decide whether it has jurisdiction, though the point was not raised until the hearing, was affirmed by Lord Hardwicke in *Penn v. Lord Baltimore*, 1 Versey, Sr., 444, 447, and Mr. Justice Iredell said, in his opinion in *Chisholm's case*, 2 Dall., 429, that although the State voluntarily appeared, it would have been the duty of the Court to carefully consider, before giving judgment, whether it had jurisdiction.

This is especially true of original suits between sovereign

States in the Supreme Court; the Court will not assume jurisdiction unless it plainly exists; and the objection may be taken at any time.

In *Rhode Island v. Massachusetts,* 12 Peters, 657, after bill, plea and answer, Mr. Webster made a motion to dismiss the action for want of jurisdiction, and the Court entertained the motion, but, upon consideration, held that it had jurisdiction of the cause; whereupon Mr. Webster, on account of the reference in the opinion to the voluntary appearance of the State, moved the Court for leave to withdraw the plea filed on behalf of the defendant, and also the appearance theretofore entered for the State of Massachusetts. The Court said that the appearance and plea did not affect its decision on the point of jurisdiction, and overruled the motion.

Rhode Island v. Massachusetts, supra, at page 759.

In the recent case of *Minn. v. Hitchcock,* 185 U. S., 373, it is held that:

> "Neither the silence of counsel nor the express consent of the parties will justify the Supreme Court of the United States in ignoring the question whether it has original jurisdiction of a suit commenced therein."

Apparently, there was bill, answer and proof in *New Hampshire v. Louisiana,* 108 U. S., 76, and yet the Court dismissed the cause for want of jurisdiction.

It is conceded that this Court has jurisdiction of the parties, provided it be such a "controversy between two or more States" as is contemplated in the grant of judicial power by Art. III, sec. 2, of the Constitution.

If the facts show the suit to be such a "controversy," the failure to demur is immaterial—the demurrer would have been overruled; if it be not such a "controversy," the objection may be taken at any time, because the Court has no jurisdiction of the subject matter.

Equity Rule 29.
1 Foster's Fed. Prac., pages 241, 249, 535, 536.
53 Fed. Rep., 18.

Besides, Art. IV, sec. 9, of the Constitution of North Carolina is as follows:

> "The Supreme Court shall have original jurisdiction to hear claims against the State, but its decision shall be merely recommendatory, no process in the nature of execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action."

Under this provision of the Constitution, it has been held that the only authority *competent to give consent for the State of North Carolina to be sued* is the General Assembly.

Moody v. State Prison, 128 N. C., 12.

And this has never been done.

And even if a State had consented to be sued, the consent could be withdrawn at any time, as it has been by the protest of the State.

Beers v. Arkansas, 20 How., 527.
Mighell v. Sultan of Johore, (1894) 1 Q. B., 149.
Judgment of Lord Esher.

II.

The State of North Carolina did not consent to be sued in a cause like this by becoming a member the United States and subscribing to the Constitution. The present suit is not such a "controversy between two or more States" as was contemplated by the Constitution of the United States.

The complainant argues that this cause comes within the words of grant of judicial power to this Court; that it is a "controversy between two or more States," and also between "a State and citizens of other States," and is of a civil nature.

But it is clear that this is not conclusive.

There are many cases in which this Court has decided against the jurisdiction which seemed to come within the words of the Constitution.

In *Ky. v. Dennison*, 24 Howard, 66, the Court declared it to be the duty of the State of Ohio, or its Governor, to deliver up to Kentucky a fugitive slave, but declined to give judgment on the ground that it had no means of compelling obedience to its decrees.

In *Miss. v. Johnson*, 4 Wallace, 475, and in *Georgia v. Stanton*, 6 Wallace, 50, the Court declined to entertain the cause and to give judgment, because it was an attempt to induce the Court to interfere in political matters.

See also:

New Hampshire v. Louisiana, 108 U. S., 76.

Wisconsin v. Pelican Insurance Co., 127 U. S., 265. 287.

Hans v. Louisiana, 134 U. S., 1.

Louisiana v. Texas, 176 U. S., 1.

The grant was of "judicial power," hence, controversies not properly subject, according to the accepted principles of jurisprudence, to judicial determination, were not included.

In *Louisiana v. Texas*, 176 U. S., 1, on page 18, Chief Justice Fuller said:

> "As might be expected in view of the nature of the jurisdiction, the cases are few in which the aid of the Court has been sought in controversies between two or more States."

The word "controversies" is not defined in the Constitution, but *all* controversies were not intended, says Bancroft, because the word "all," which had been used in the preceding grants, was dropped here and purposely.

> *2d Bancroft's History of the Constitution*, pages 199, 200.
> *R. I. v. Mass.*, 12 Peters, 721.

The controversies intended by the framers of the Constitution were naturally akin to those with which they had become familiar from the experience of the colonies, such as those growing out of claims for soil, territory, jurisdiction and boundary.

In *U. S. v. Texas*, 143 U. S., 621-639, Justice Harlan says:

> "At the time of the adoption of the Constitution, there existed, as this Court said in Rhode Island v. Massachusetts, 12 Peters, 657, 723, 724, controversies between eleven States, in respect to boundaries, which had continued from the first settlement of the colonies. The necessity for the creation of some tribunal for the settlement of these *and like controversies* that might arise, under the new government to be formed, must,

> therefore, have been perceived by the framers of the Constitution, and, consequently, among the controversies to which the judicial power of the United States was extended by the Constitution, we find those between two or more States."

Story, in his Commentary on the Constitution (1833), sections 1674-1675, says:

> 1674: "Before the adoption of this instrument, as well as afterwards, very irritating and vexatious controversies existed between several of the States in respect to soil, jurisdiction and boundary, and threatened the most severe public mischiefs." * * *
>
> 1675: "Before the Revolution, controversies between the colonies, concerning the extent of their rights of soil, territory, jurisdiction and boundary, under their respective charters, were heard and determined before the King and Council, who exercised original jurisdiction therein, upon the principle of feudal sovereignty. * * * The same necessity which gave rise to it in our colonial state, must continue to operate through all future time. Some tribunal exercising such authority is essential to prevent an appeal to the sword and a dissolution of the government."

And while the language of the Constitution was not intended to be strictly limited to these subjects, the genesis of the clause, as given in the opinion of the Chief Justice in *Louisiana v. Texas,* 176 U. S., 13, would seem to show that it was intended to restrict the jurisdiction to disputes *arising directly between States,* and not to assumed quarrels.

This view is strengthened by the fact that there is manifested in the Constitution a purpose to prevent the possibility of disputes arising between States by giving to Congress con-

trol over interstate commerce and other matters which would naturally lead to friction, even going so far as to prohibit compacts and agreements between States, except by and with the consent of Congress.

Bancroft says, *History of the Constitution*, pages 212, 213:

> "In framing the Constitution, Madison kept in mind that the functions of the general government should extend to the prevention of 'trespasses of the States on the rights of each other.'"

Hamilton, in the eightieth number of the Federalist, after arguing from history that the power of determining causes between the States was essential to the peace of the Union, says (page 534):

> "But there are many other sources, besides interfering claims of boundary, from which bickerings and animosities may spring up among members of the Union. * * * Whatever practices may have a tendency to disturb the harmony between the States, are proper objects of Federal superintendence and control."

The last sentence seems to give a clue to the solution of the question as to the kind of controversies contemplated by the Convention. They must arise between the contending States and grow out of State action deemed to be immediately and directly prejudicial to the complaining State,—action which would, or might, become a cause of war, if the States were independent nations.

And the decisions of this Court, in this class of cases, tend to confirm this view.

Indeed, with the exception of the recent cases of *Missouri v. Illinois,* 180 U. S., 208, and *Kansas v. Colorado,* 185 U. S., 125, the Court is believed to have entertained jurisdiction in interstate suits only in cases of unascertained boundary and jurisdiction. In *Missouri v. Illinois,* upon demurrer to the bill, the Court held that it had jurisdiction to restrain the State of Illinois from emptying the sewerage of Chicago into the Mississippi River, because it was, or might be, an immediate injury to the State of Missouri, which could be redressed in no other way than by the action of the public—the State; (*Harvard Law Review,* vol. 15, page 68); and in *Kansas v. Colorado,* that it had jurisdiction to restrain the diversion of the waters of the Colorado River to the irreparable injury of the whole State of Kansas.

In each of these cases the controversy arose directly between the contending States, and was not factitious—made by the voluntary action of the complaining State by assuming a controversy already existing and with which it had no proper concern.

It is not difficult to believe that practices such as were complained of in *Missouri v. Illinois,* and *Kansas v. Colorado,* as well as the cases of disputed boundary, might lead to war between independent nations; but surely there was no absolute necessity in order to prevent an "appeal to the sword" for a tribunal to collect ordinary debts; loans due by a State to private individuals, and which they, being unable to collect, voluntarily assign to another State, *especially when the citizens of such other State have all the remedies of citizens of the debtor*

State. States do not ordinarily maintain the quarrels of their citizens, certainly not the citizens of other States, for failure to pay debts, much less go to war for them.

While writers on international law differ somewhat among themselves, many of those of greatest authority say that it is the practice of nations, when petitioned by their citizens, to intervene for the enforcement of obligations due by other nations to them, to make a distinction between such obligations as are contractual—loans voluntarily entered into with a knowledge of all the risks and the inability of collection by suit—and such as are tortious.

They generally refuse to interfere for the collection of debts, but do, for the redress of other kinds of grievances.

> *1 Halleck International Law,* 435, and note.
> *W. E. Hall International Law* (3d Edition), 277.
> *New Hampshire v. Louisiana,* 108 U. S., 76.

And such has been the practice of England and the United States. To show the practice of the United States, the following citations from *Wharton's Digest of International Law,* section 231, are made:

> "With regard to the contracts of an individual born in one country with the government of another, most especially when the individual contracting is domiciliated in the country with whose government he contracts, and formed the contracts voluntarily, for his own private emolument, and without the privity of the nation under whose protection he has been born, he has no claim whatsoever to call upon the government of his nativity to espouse his claim, this government having

no right to compel that with which he voluntarily contracted to the performance of that contract."

"Mr. J. Q. Adams, Secretary of State, to Mr. Salmon, April 29, 1823, 5 Am. St. Pap. (For. Rel.), 403."

* * * * * * * * *

"It is not usual for this government to interfere except by its good offices for the prosecution of claims founded on contracts with foreign governments."

"Mr. Calhoun, Secretary of State, to Mr. Crump, May 28, 1844."

* * * * * * * * *

"The claimants in this case stand in the relation of parties to a contract into which they voluntarily entered with the government of Brazil, against which they now seek indemnity for losses sustained, resulting, as it is said, from acts of that government alleged to be in contravention of their contract. It is a well established rule of this government that in such cases the parties are remitted for the redress of injuries resulting from any breach or disregard of the contract to the laws of the country in which the agreement was entered into, and where it is to be performed. This rule, so far as known, is one generally recognized by other civilized powers."

"Mr. Fish, Secretary of State, to Mr. Pratt, July 17, 1875, MSS. Dom. Let."

To show the practice of Great Britain, we quote the reply of Lord Derby, Foreign Secretary, to a committee of British merchants, page 35:

"If it were understood that the English creditor of defaulting foreign States might rely upon English arms to enforce the contract, why need he take thought regarding the security on which he lends his money? He would have the advantage when the credit of the

borrowing State was not the best, of high interest, and would be sure, if anything went wrong, that English power would be employed to set him right. He would thus be put in a better position than the creditors of England herself, who must be satisfied with three per cent. When the foreign loans which the commission inquired about were contracted, there was no understanding that, in case of default, the government would go to the rescue of the creditors; for, in that event, the loans would have been obtained on better terms. Where would be the justice of suddenly altering the conditions of the contract by intruding the force of British diplomacy upon the field?

"How could it be right to impose burdens on the nation to save the people from the evil which is the result of their own imprudence and greed of high interest? Would it be at all fair to make all classes of the community pay to help those people who, with their eyes open, risked their money because the profit was far above what usually attends a safe investment?"

British Quarterly Review, Jan., 1876, page 54.

Such also was the policy announced by Mr. Balfour in the House of Commons on December 15, 1902, in the debate on the Venezuelan question.

But it is understood that the contention of complainant's counsel is that this suit is brought in vindication of its property rights, and there are several cases in which this Court has entertained original bills to protect the proprietary rights of a State against injury or infringement by *individuals*, such as

Georgia v. Brailsford, 2 Dal., 402.

Pennsylvania v. Wheeling Bridge Company, 13 How., 618.

Texas v. White, 7 Wall., 700.
Florida v. Anderson, 91 U. S., 667.
Alabama v. Burr, 115 U. S., 413.

We submit, however, that the fact that the suit is brought in vindication of the property rights of the complaining State is also not conclusive. This Court, we believe, has never pronounced final judgment in such an action; and there are at least two cases in which it has declined to entertain such jurisdiction.

New Hampshire v. Louisiana, 108 U. S., 76.
Wisconsin v. Pelican Insurance Co., 127 U. S., 265.

In both of these cases, we submit, property rights were involved; but the Court declined jurisdiction on account of the nature of the title and the method and purpose of its acquirement.

In *New Hampshire v. Louisiana,* the suit was on bonds of the defendant State which had been assigned to the complainant State, which had the legal title and the right to collect and receipt for the same, when, according to general principles of law, the validity of the assignment was not open to question by the debtor State.

Walker v. Bradford Old Bank, 12 (1883-84) Q. B. D., 511.

But the Court declined jurisdiction, because it was an attempt to evade the prohibition of the Eleventh Amendment by using the State as a collecting agent, which we think is being attempted in the present suit, with more boldness but not more ingenuity.

In *Wisconsin v. Pelican Insurance Company* the State of Wisconsin owned a judgment, which it had obtained against the Pelican Insurance Company, and a judgment is such property as a State may sue to protect. (*Georgia v. Brailsford,* 2 Dal., 402.) But when the State of Wisconsin brought suit on this judgment in this Court, jurisdiction was declined because the judgment was obtained on a cause of action, which, under the settled principles of public law, the Courts of no other jurisdiction would enforce—it was a judgment for a penalty.

Whether the subject matter of a "controversy between two or more States" is included within the grant of judicial power of this Court must be determined not only by the language of the Constitution but also by the decisions of the Court and historical considerations.

Shiras, J., in *Mo. v. Ill.,* 180 U. S., 219.

In Chisholm v. Georgia, Justice Iredell had earnestly insisted that, by the grant of "judicial power," it was not intended to give new and unheard of remedies, but the language would have to be construed with reference to antecedent remedies, well known to common law (2 Dallas, 437), and that by the common law an action of assumpsit would not lie against the sovereign.

In *Wisconsin v. Pelican Insurance Co.,* Mr. Justice Gray said, at pages 287, 289:

> "Notwithstanding the comprehensive words of the Constitution, the *mere fact that a State is the plaintiff* is not a conclusive test that the controversy is one in

which this Court is authorized to grant relief against another State or her citizens. * * *

"The object of vesting in the Courts of the United States jurisdiction of suits by one State against the citizens of another was to enable such controversies to be determined by a national tribunal, and thereby to avoid the partiality, or suspicion of partiality, which might exist if the plaintiff State were compelled to resort to the Courts of the State of which the defendants were citizens. Federalist, No. 80; Chief Justice Jay, in Chisholm v. Georgia, 2 Dall., 419, 475; Story on the Constitution, secs. 1638, 1682. The grant is of 'judicial power' and was not intended to confer upon the Courts of the United States jurisdiction of a suit or prosecution by the one State, of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other State at all."

In *Hans v. Louisiana,* 134 U. S., 1, 15, Mr. Justice Brad ley, speaking for the Court, said:

"The truth is, that the cognizance of suits and actions unknown to the law and forbidden by the law was not contemplated by the Constitution when establishing the judicial power of the United States. Some things, undoubtedly, were made justiciable which were not known as such at the common law; such, for example, as controversies between States as to boundary lines, and other questions admitting of judiciary solution. And yet the case of *Penn v. Lord Baltimore,* 1 Ves. Sen., 444, shows that some of these unusual subjects of litigation were not unknown to the Courts even in colonial times, and several cases of the same general character arose under the Articles of Confederation, and were brought before the tribunal provided for that purpose in those articles. 131 U. S. App., 1. The establishment of this new branch of jurisdiction seemed to be neces-

sary from the extinguishment of diplomatic relations between the States. Of other controversies between a State and another State or its citizens, which, on the settled principles of public law, are not subjects of judicial cognizance, this Court has often declined to take jurisdiction. (See *Wisconsin v. Pelican Insurance Co.*, 127 U. S., 265, 288, 289, and cases there cited."

Query: Is it not questionable whether anything was made justiciable by the Constitution that was not such before? Was it not rather an extension of jurisdiction over parties previously not subject to judicial action rather than an extension of judicial power over subject matters which were previously beyond the competency of the Courts to deal with?

But however that be, and, in addition to the fact that the pleadings and proof show that the controversy is factitious—the result of elaborate contrivance, more or less participated in by complainant—and not one arising directly between the two States and growing out of their public relations and intercourse—not one in which the States of South Dakota and North Carolina are in direct antagonism as States—we insist that there are special reasons why this Court should not entertain jurisdiction of such an action.

I. A State is not liable to suit upon its bonds, either by an individual or another State.

II. If a suit can be brought upon the bonds of a State by another State, no such suit can be brought upon bonds voluntarily transferred to the State merely because the holder of them cannot collect them.

III. If suits can be brought against a State upon bond so assigned to another State, the present suit cannot be maintained, because it is a suit by the State of South Dakota AND Charles Salter, representing all individual bondholders of the same class, against the State of North Carolina.

We will discuss these propositions seriatim.

I. A State is not liable to suit upon its bonds, either by an individual or another State.

There seems to be no doubt that suits against States for the collection of debts were unheard of at the time of the adoption of the Constitution and the power to bring them would not have been included if the proposition had been made.

In *Bank of Washington v. Ark.*, 20 Howard, 530, 532, Mr. Chief Justice Taney, delivering the opinion of the Court, said:

> "Those who deal in the bonds and obligations of a sovereign State are aware that they must rely altogether on the sense of justice and good faith of the State; and that the judiciary of the State can not interfere to enforce these contracts without the consent of the State, and the Courts of the United States are expressly prohibited from exercising such a jurisdiction."

Mr. Webster, in his opinion given to Baring Bros. & Co., October 16, 1839, Works, Volume 6, 537, 539, said:

> "The security for State loans is the plighted faith of the State as a political community. It rests on the same basis as other contracts with established gov-

ernments, the same basis, for example, as loans made by the United States under the authority of Congress; that is to say, the good faith of the government making the loan, and its ability to fulfill its engagements."

These expressions of the law, among others, were cited with approval by Mr. Justice Bradley in *Hans v. La.*, 134 U. S., 1. 12-17.

In *Briscow v. Bank of Kentucky*, 11 Peters, 257, 321, Mr. Justice McLean, delivering the opinion of the Court, said:

"No sovereign State is liable to be sued without her consent. Under the Articles of Confederation, a State could be sued only in cases of boundary. It is believed that there is no case where a suit has been brought at any time, on bills of credit against a State, *and it is certain that no suit could have been maintained on this ground prior to the Constitution.*"

In *Crouch v. Credit Foncier*, 8 Court of Q. B., (1872-'73,) 374, 384, Mr. Justice Blackburn said:

"Foreign and colonial governments frequently create a public debt, the title to portions of which is made to depend on the possession of bonds expressed to be payable to the bearer or holders. There can hardly be said properly to be any right of action on such instruments at all, though the holder has a claim on the government."

Hamilton, in his Report in 1795, Annals of Congress 1793-'95, 3 Congress, page 1635, said:

"Public debt can scarcely, in legal phrase, be defined either as property in possession or in action. It is evidently not the first till it is reduced to possession by payment. To be the second, would suppose

> a legal power to compel payment by suit. Does such a power exist? The true definition is, a property subsisting in the faith of the government. Its essence is promise. Its definite value depends upon the reliance that the promise will be definitely fulfilled."

We may assume, then, that suits for the collection of State debts were unknown at the time of the adoption of the Constitution, and were not contemplated by the framers of that instrument or the States which adopted it, and, judging from the earnestness with which the leading champions of the Constitution, such as Hamilton, Madison and Marshall, labored to show that States were not liable to be sued on their debts, and the difficulty of securing its ratification in such States as Virginia and New York, in spite of such assurances, and the indignation caused by the decision in *Chisholm's case*, we may be sure that such a provision would not have been accepted if it had been proposed, and, according to the opinion of Mr. Justice Bradley, in *Hans v. Louisiana*, quoted above, such suits as were not contemplated by the framers of the Constitution are not included in the grant of "judicial power."

The view that what was not contemplated by the framers of the Constitution is not included in the grant of judicial power is also advanced by Campbell, Justice, in his dissenting opinion in *Florida v. Georgia*, 17 Howard, 513, and apparently is adopted by Chief Justice Marshall as a test for the decision of the status of an Indian tribe in the case of the *Cherokee Nation v. State of Georgia*, 5 Peters, 1, for he says, on page 18:

> "These considerations go far to support the opinion that the framers of our Constitution had not the In-

> dian tribes in view when they opened the Courts of the Union to controversies between a State, or the citizens thereof, and foreign States."

Another reason why a suit can not usually be maintained against a State to compel the payment of its debts, whether the plaintiff be an individual or a State, is that it might necessitate an interference with, if not the complete control and direction of, the legislative function of assessing, levying, collecting and distributing taxes, which is, as yet, beyond the competency of Courts; there is no means of rendering the decree effective, unless this Court is prepared to appoint a receiver with the extraordinary powers of taking charge of and administering the affairs of a delinquent State.

But the separation and careful demarkation of the functions of government into executive, legislative and judicial, is the distinguishing characteristic of our Constitution, State and National, and neither Department can transgress its proper bounds.

People ex rel. Broderick v. Morton, 156 N. Y., 136.

In *Cherokee Nation v. State of Georgia*, 5 Peters, 1, the bill was dismissed because the plaintiff was neither a foreign State nor a State of the Union; but at the close of his opinion, page 20, Chief Justice Marshall said:

> "The mere question of right, might, perhaps, be decided by this Court in a proper case with proper parties. But the Court is asked to do more than decide on the title. The bill requires us to control the Legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition

by the Court may be well questioned. It savors too much of the exercise of political power to be within the proper province of the judicial department."

Prof. Dicey, in his work on the *Conflict of Laws*, page 38, says:

"*General Principle* No. III.—The sovereign of a country, acting through the Courts thereof, has jurisdiction over (*i. e.*, has a right to adjudicate upon) any matter with regard to which he can give an effective judgment, and has no jurisdiction over (*i. e.*, has no right to adjudicate upon) any matter with regard to which he can not give an effective judgment."

Subsequently he explains that an effective judgment is one that can be enforced.

Judge Miller, in his work on the Constitution, page 314, says:

"Judicial power is, perhaps, better defined in some of the Reports of our own Courts than in any other place, and especially so in the Supreme Court of the United States, because it has more often been the subject of comment there, and its consideration more frequently necessary to the determination of questions arising in that Court than anywhere else. It is the power of a Court to decide and pronounce a judgment *and carry it into effect* between persons and parties who bring a case before it for decision."

The decision—or interlocutory order—in *Chisholm v. Georgia*, 2 Dallas, 419, undoubtedly was against this view, but that decision, as an interpretation of the original Constitution, was doubted by Mr. Justice Campbell in *Florida v. Georgia*, 17 Howard, and expressly dissented from by Mr. Justice Bradley,

delivering the opinion of the Court, in *Hans v. Louisiana, supra,* and may be considered to be overruled.

In the Notes by Davis to *Miller on the Constitution,* page 423, it is said:

> "In Hans v. Louisiana, 134 U. S., 1, which was an action against the State of Louisiana, brought by one of its citizens to recover on coupons annexed to bonds of the State, it was held that a State could not, without its consent, be sued in a Circuit Court of the United States, upon the suggestion that the case was one arising under the Constitution and Laws of the United States, and Chisholm v. Georgia, 2 Dallas, 419, commented on by Judge Miller in this chapter, was substantially overruled, the Court saying that the views of Mr. Justice Iredell, who dissented from the judgment, were clearly right."

The reasoning of Mr. Justice Iredell, in his judgment in *Chisholm's case,* is not so much that an action of assumpsit will not lie by an *individual* against a State, as that *no action of assumpsit,* by whomsoever brought, would lie against a State.

In arguing this proposition he says, on pages 445 and 446:

> "Now let us consider the case of a debt due from a State. None can, I apprehend, be directly claimed but in the following instances:
>
> "1. In case of a contract with the Legislature itself.
>
> "2. In case of a contract with the executive, or any other person in consequence of an express authority from the Legislature.
>
> "3. In case of a contract with the executive without any special authority.
>
> "In the first and second cases, the contract is evidently made on the public faith alone. *Every man*

> ***must know that no suit can lie against a legislative body.*** His only dependence, therefore, can be, that the Legislature, on principles of public duty, will make a provision for the execution of their own contracts, and if that fails, whatever reproach the Legislature may incur, the case is certainly without remedy in any of the Courts of the State. It never was pretended, even in the case of the Crown in England, that if any contract was made with Parliament, or with the Crown by virtue of an authority from Parliament, that a petition to the Crown would in such case lie."

The case of *United States v. North Carolina,* 136 U. S., 211, may also be cited against us. That was an action of debt on certain bonds held by the United States as Trustee for the Cherokee Indians. It is a matter of history that the State of North Carolina claimed that she did not owe the interest on the bonds, while the authorities of the United States claimed that she did. There were various efforts made to settle the dispute, and finally a case was agreed upon and submitted for judgment to this Court, no question being made as to the jurisdiction. It is true that in *United States v. Texas,* 143 U. S., Mr. Justice Harlan said that the question whether this Court had jurisdiction of a suit brought by the United States against a State did not escape its attention; but he evidently did not regard the case as controlling on this point, and, so far as appears, the point we are now endeavoring to make, to-wit: that States can not be made to pay their debts by process from this or any other Court, was not considered, and the burden of deciding the cause was imposed upon the Court, just as Mr. Justice Miller says, with some warmth, in *Hawes v. Oakland,* 104 U. S.,

450, 453, the burden of deciding stockholders' suits has been imposed upon the Federal Courts.

His language is so apposite to this cause that we quote it. He said:

> "If no non-resident stockholder exists, a transfer of a few shares is made to some citizen of another State, who then brings the suit. The real defendant in this action may be quite as willing to have the case tried in the Federal Court as the corporation and its stockholder. If so, he makes no objection, and the case proceeds to a hearing. Or he may file his answer denying the special grounds set up in the bill as a reason for the stockholder's interference, at the same time that he answers to the merits. In either event the whole case is prepared for hearing on the merits, the right of the stockholder to a standing in equity receives but little attention, and the overburdened Courts of the United States have this additional important litigation imposed upon them by a simulated and conventional arrangement, unauthorized by the facts of the case or by the sound principles of equity jurisdiction."

The case of *U. S. v. N. C.*, 136 U. S., 211, then, is a case where both parties invoked the jurisdiction of the Court and naturally it was not fully considered. The State consented to be sued.

Dicey on the *Conflict of Laws*, 212.

So we think the question whether this Court can give judgment against a delinquent State for a debt is not concluded against our contention by judgement.

In *U. S. v. Guthrie, 17 How.*, 284, 303, Mr. Goodrich was appointed Judge, and, before the expiration of his term, he was

removed and Mr. Fuller was appointed in his stead and received the salary. Mr. Goodrich, being refused, upon demand, the balance of his salary, brought mandamus against the Secretary of the Treasury to compel its payment. Upon writ of error this Court said:

> "The only legitimate inquiry for our determination upon the case before us is this: Whether, under the organization of the Federal Government, or by any known principle of law, there can be asserted a power in the Circuit Court of the United States for the District of Columbia, or in this Court, to command the withdrawal of a sum or sums of money from the Treasury of the United States, to be applied in satisfaction of disputed or controverted claims against the United States? This is the question, the very question presented for our determination; and its simple statement would seem to carry with it the most startling considerations—nay, its unavoidable negation, unless this should be prevented by some positive and controlling command; for it would occur, *a priori*, to every mind, that a treasury, not fenced round or shielded by fixed and established modes and rules of administration, but which could be subjected to any number of description of demands, asserted and sustained through the undefined and undefinable discretion of the Courts, would constitute a feeble and inadequate provision for the great and inevitable necessities of the nation. The government under such a *regime*, or, rather, under such an absence of all rule, would, if practicable at all, be administered not by the great Departments ordained by the Constitution and laws, and guided by the modes therein prescribed, but by the uncertain and perhaps contradictory action of the Courts, in the enforcement of their views of private interests."

These observations apply with equal force to the treasuries of the States, which are sovereign within the province of their reserved powers, including the management of their fiscal affairs.

The Constitution of North Carolina, Art. 14, sec. 3, provides:

> "No money shall be drawn from the treasury but in consequence of appropriations made by law."

So it is held in *Garner v. Worth,* 122 N. C., 250:

> "The Courts can not direct the State Treasury to pay a claim against the State, however just and unquestioned, where there is no legislative appropriation to pay the same; and when there is such an appropriation, the coercive power is applied not to compel the payment of the State liability, but to compel a public servant to discharge his duty by obedience to a legislative enactment."

See also

Railroad v. Jenkins, Treasurer, 68 N. C., 499, 504.
Shaffer v. Jenkins, Treasurer, 72 N. C., 275.

In many of the cases in this Court in which attempts have been made to collect debts from States there have been strong intimations that, over and above the objection that States are exempt from suit by the Eleventh Amendment, Courts had no process by which they could collect debts from States.

In *Marye v. Parsons,* 114 U. S., 325, 328, Mr. Justice Matthews, delivering the opinion of the Court, said:

> "So far as the contract with the complainant was, that the State should pay to him his coupons at maturity, there is, no doubt, a breach; but he asks no re-

lief as to that, *for there is no remedy by suit to compel the State to pay its debts.*"

In *in re. Ayers,* 123 U. S., 443, 491, Mr. Justice Matthews said:

> "The remedy sought, in order to be complete, would require the Court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection and disbursement of the tax in question, until the bonds, principal and interest, were paid in full, and that, too, in a proceeding in which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power can not be thus ousted of its jurisdiction and the judiciary set in its place."

In *Rees v. City of Watertown,* 19 Wall., 107, 116, 117, the Court said:

> "We are of opinion that this Court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary; especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important."

See also

Heine v. the Levee Commissioners, 19 Wall., 655, 661.

Rose's Notes on United States Reports, Vol. 8, page 233.

Virginia Law Journal, March, 1879, article by Hon. W. H. Burroughs, entitled "Can States be Compelled to Pay their Debts?"

It may be said that, in this case, it is not necessary for the Court to levy, collect and disburse taxes, as there is property mortgaged, which the Court can seize and apply to the payment of any judgment which it may render; but that seems to us to be a narrow view of the subject, the real question being a much broader one, to-wit: whether a State can be made to pay its ordinary debts—bonds issued to individuals—by the compulsive process of this Court? And we think it beyond question that the grant of such power was not intended to be made by the Convention which formulated the Constitution, or the States which adopted it, and is therefore not included. Besides, suppose the mortgage should be invalid, as we think it is, or that there should not be property enough to pay all of the claims, would the Court grant a deficiency judgment, as is required in cases in the Circuit Court under Equity Rule 92 (*Northwestern M. L. Ass'n v. Keith,* 40 U. S., App., 716; 77 *Fed. Rep.,* 374), and if so, how is that decree to be carried into effect? Only by taking charge of the State's Treasury.

It has been suggested that it would be the duty of the Court to adjudge the indebtedness, even if compelled to leave it optional with the defendant State whether she would perform the decree. We submit that the course pursued by this Court in *Kentucky v. Dennison,* 24 How., 66, is much more befitting its

dignity—to decline jurisdiction unless it has ample power t execute the decree.

Not only that, "But no Court sits to determine question *of law in thesi.*"

Marye v. Parsons, 114 U. S., 330.

In *ex rel. Broderick v. Morton,* 156 N. Y., 136, the Court of Appeals, when asked for a mandamus against the Governor, declined, and in its opinion said:

> "Again, it is the well settled practice of the Court not to determine abstract questions not involved in the litigation, *or in regard to which it has no power to enforce its judgments and decrees.*"

II. If a suit can be brought upon the bonds of a State by another State, no such suit can be brought upon bonds transferred to the State merely because the holder of them cannot collect them.

We have attempted above to show that State debts could not be collected by suit, for two reasons:

First. That such suits were unheard of at the time of the adoption of the Constitution, and, therefore, not included within the grant of judicial power.

Secondly. That to do so would, or might, require the Courts to assume the political and legislative functions of levying, collecting and disbursing the public taxes of a State.

If we are wrong in this, we insist that the collection of debts from a recalcitrant State by the compulsive process of this Court should be confined to debts due directly to the complaining States upon dealings, contracts, transactions between

the States, or at any rate to obligations acquired "in due course of trade," if such an acquisition be possible.

Chancellor Kent, discussing the jurisdiction of this Court, expressed a grave doubt whether such an action as this would lie. He said, *1 Kent's Commentaries,* 297, note d:

> The result is (1) No citizen of any of the United States, or subject of a foreign State, can sue a State; (2) That a foreign State may sue one of the United States before the Supreme Court of the United States, and there only; (3) That the United States can not be sued; (4) That the United States may sue a State, and perhaps they may, as a *bona fide assignee* of an individual creditor of a State, and perhaps an individual State, or a foreign State, as such assignee may do it. (See Hamilton's Report on Public Credit, 1790, page 9.) This last point is without any judicial support that I am aware of; and it may be questioned how far voluntary assignments made and accepted for the sake of the remedy would be available."

We confidently insist that a thorough consideration of the subject will resolve all doubt against the right to sue.

When issued and in the hands of the original holders, indeed, until they came into the possession of the State of South Dakota, it is admitted that they were uncollectable by suit, were agreements of imperfect obligation, were pacts rather than contracts (Mackeldy Roman Law, sec. 393), and it is a general rule of law that no one can confer a greater right than he has—that the transferee must abide the title of his transferrer. *"Nemo dat quod non habet."* Fed. Case No. 1007.

After stating with his usual force and lucidity the general

rule, Professor Langdell, in his *Treatise on Equity Pleadings*, page 209, says:

> "But there have always been exceptional cases even at common law, in which a *purchaser for value* without notice acquired a perfect title regardless of the title of his vendor. One of these exceptions (in England) is that of goods sold in market overt; another is that of current coin paid and received as money; and this exception has been extended in modern times so as to include all negotiable securities payable to bearer. Another exception (under our recording acts) is that of the sale and conveyance of real estate to which the vendor has no title, in consequence of his having previously conveyed it to another person by an unrecorded deed. These exceptions, however, are all founded upon *public policy* and the merits of the individual purchaser, though a necessary element of his title, are by no means the controlling consideration in establishing and maintaining it."

It is difficult to see that commerce has languished because States have not been active competitors in the market for repudiated bonds, or that public policy will be subserved by encouraging, or even allowing, the assignment of the bonds of a State for the purposes of suit.

It has been supposed that the jurisdiction over controversies between two or more States was given to the Supreme Court for the purpose of settling disputes—allaying strife—and not for the purpose of fomenting quarrels. What surer method of arousing jealousies, engendering hostilities and retaliations can be conceived than by encouraging such suits between States? Such, at any rate, is the teaching of experience.

But these bonds were past due and unenforcible in the

hands of Simon Schafer, the assignor, when the assignment was made, and the transfer was voluntary; hence the transfer does not come within the terms of either of the exceptions mentioned by Prof. Langdell, above; and, unless there is some peculiar merit in the transferee, a sovereign State, the bonds were not made actionable by the transfer. We think they would not have been made actionable by transferring them before maturity, certainly not after dishonor.

It seems to be universally agreed that "a sovereign State can not be forced into Court against her consent; but a cross-bill presupposes that the plaintiff is already in Court rightfully, and when the State comes into Court of her own accord and invokes its aid, she is, of course, bound by all the rules established for the administration of justice between individuals."

Simonton, J., in *P. R. and A. R'y. Co. v. So. Car.*, 60 Fed. Rep., 552, 553.
Prioleau v. U. S., L. R., 2 Eq., 652.

In *The Siren*, 7 Wallace, 152, on page 159, it is said: "By its (the government) appearing in Court, as we have already said, it waives its exemption and submits to the application of the same principles by which justice is administered between private suitors."

These principles are illustrated in a great variety of cases.

Brent v. Bank of Washington, 10 Peters, 596.
United States v. Bank of Metropolis, 15 Peters, 377.
The Davis, 10 Wallace, 15.
United States v. Ingate, 48 Fed. Rep., 251.
United States v. Flint, Fed. Case No. 15,121.
United States v. Wilder, Fed. Case 16,694.

United States v. Union Natl. Bank, Fed. Case 16,597.
United States v. Barker, Fed. Case No. 14,520.

The chief, if not the only, exception to the principle that the Government when it invokes the aid of the Court, invokes the application of the principles of law and equity by which the Court administers justice between individuals are *laches and the statute of limitations.*

Notwithstanding the fact that the government, either State or National, is not barred by the statute of limitations, this Court held in U. S. v. Buford, 3 Peters, 12, that a claim barred by the statute of limitations, in the hands of the assignor, and afterwards assigned to the United States, could not be sued on; and the Court stated the law to be that "the assignment of a claim to the government gives it no greater validity than it possessed in the hands of the assignor."

To the same effect is:

U. S. v. N. C. and St. L. R. Co., 118 U. S., 125.
1 Cooley's Blackstone, 247, note (6).

This authority seems to us to be directly in point. A person holding an obligation of another, which is barred by the statute of limitations, has a valid moral claim against the person whose obligation he holds, but it is an imperfect obligation, that is, there is no remedy for its enforcement; so, an individual holding an obligation of a State has, perhaps, a valid moral claim against the State, but it is one of imperfect obligation, because there is no remedy to enforce it. The two cases seem to be analogous with reference to the remedy, and if a remedy is not given in the one case by assignment to another State, there is no reason to perceive why it would be given in the other.

It is also arguable that to hold that these bonds became actionable by assignment is to hold that the burden of an obligation can be increased by assignment beyond what was intended to be assumed by the obligor at the time of entering into the obligation; for it is certain that when these bonds were issued by the State of North Carolina, it was not intended by her, or understood by those who took them, that there was any other security for them than "the plighted faith of the State," and the same thing is true of them while in the hands of every holder prior to the complainant.

In *Tolehurst v. Ass. Port. Cement Mfrs.*, (1901) 2 K. B., 811, Mr. Justice Mathew, on page 816, says:

> "Whenever, by reason of change of business or change of parties, the result of an assignment would be to impose upon one of the contracting parties a greater liability than he ever intended to assume, the contract can not be assigned."

See also *Law Quarterly Review*, vol. 18, page 10.

In *Dicey on the Conflict of Laws*, page 534, speaking of the effect of an assignment, it is said:

> "Under whatever law the assignment takes place, the liability of the debtor, X, can not be increased through the assignment of the creditor to another person of the claim against the debtor."

If it is suggested that the "burden" of the obligation is not increased by the assignment, but only a remedy given to compel the performance of the obligation, we reply that both practically and legally the remedy is a very essential part of the obligation, and that, as taking away, or seriously clogging, a remedy is uniformly held to be an impairment of the obligation

of a contract (*Edwards v. Kearsey*, 96 U. S., 595-600) to give a remedy by suit in Court, where none such was intended to be given at the time of the original undertaking, is to seriously increase the burden, or liability, of the obligation.

The opinion that conferring the quality of suability on an agreement not originally suable, is an increase of the burden is sustained by the authority of Chief Justice Jay, who, at the end of his opinion in *Chisholm's case*, 2 Dall., 479, says:

> "That such suability may, nevertheless, not extend to all the demands, and to every kind of action, there may be exceptions. For instance, I am far from being prepared to say that an individual may sue a State on bills of credit issued before the Constitution was established, and which were *issued and received on the faith of the State, and at a time when no idea or expectation of judicial interposition were entertained or contemplated.*"

Again, as said by Mr. Campbell, a former Justice of this Court, in his argument in *New Hampshire v. Louisiana, supra:*

> "A court of chancery habitually condemns and repudiates all merchandising, huckstering, fomenting of litigations, though not within the prohibition of any enactment against champerty or maintenance."

Pollock on Contracts, page 294.

In *Hager v. Swayne*, 149 U. S., 242, 248, quoted in *Ball v. Halsell*, 161 U. S., 72, 80, it is said:

> "At common law, the transfer of a mere right to recover in an action at law was forbidden as violating the rule against maintenance and champerty; and,

> although the rigor of that rule has been relaxed, an assignment of a chose in action will not be sanctioned when it is opposed to any rule of law or public policy."

It is submitted that to sustain a suit brought by a State on an assignment of bonds because the holder can not collect them, tends to violate the highest considerations of public policy—the preservation unimpaired of the amicable relations between the States—and contravenes the spirit of the Eleventh Amendment, if it does not practically nullify that Amendment.

When the Constitution was pending for adoption, the colonies, or States, were heavily indebted from causes growing out of the war and otherwise, and it was insisted by the opponents of the Constitution, both in the public press and in the various State conventions, that that instrument would enable holders of the public securities of the States to harass those States and incommode the management of their fiscal affairs by assigning them so that they could be sued on in the Federal Courts. This view was vigorously combatted by Hamilton in the eighty-first number of the *Federalist,* and by Marshall, Madison and others, the chief supporters of the instrument; and Hamilton insisted that *"the contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will.* To what purpose would it be to authorize suits against States for the debts they owe? *How could recoveries be enforced?* It is evident it could not be done without waging war against the contracting State; and to ascribe to the Federal Courts, by mere implication, and in destruction of a pre-existing right of

the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable."

It was not, in the opinion of Chief Justice Marshall, so much the apprehension of a loss of dignity in being haled before a Court, as the danger of being compelled, by legal process, to pay their debts—the danger of having their complex fiscal affairs taken out of the control of the proper State officers and placed in the hands of this Court—that caused such universal alarm in the States and produced the movement for the passage of the Eleventh Amendment.

In *Cohens v. Virginia,* 6 Wheaton, 246, 406, Chief Justice Marshall said:

> "It is a part of our history that, at the adoption of the Constitution, all the States were greatly indebted, and the apprehension that these debts might be prosecuted in the Federal Courts formed a very serious objection to that instrument. Suits were instituted, and the Court maintained its jurisdiction. The alarm was general, and to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress and adopted by the State Legislatures. * * * We must ascribe the amendment to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, *were persons who might probably be its creditors. There was not much reason to fear that foreign or sister States would be creditors to any considerable extent,* and there was reason to retain the jurisdiction of the Courts in those cases, because it might be essential to the preservation of peace. The amendment, there-

fore, extended to suits commenced or prosecuted by individuals, but not to those brought by States."

It was certainly the opinion of Hamilton, before the adoption of the Eleventh Amendment (81 Federalist), as the above quotation shows it to have been the opinion of Chief Justice Marshall, after its passage, that the States were in no danger of being coerced in the payment of their debts by an assignment of them to any one. Indeed, it was the opinion of that great Judge that to prevent a State from being coerced in the payment of their debts was the primary cause of the Eleventh Amendment. Such also is the expressed opinion of Mr. Justice Miller, in his Lectures on the Constitution, page 382. He says:

"The amendment just quoted was supposed to have settled the question of the suability of a State upon its obligations, or for its debts in any other mode than that to which the State should give its express consent, and that the Courts of the United States had no jurisdiction to entertain such suits. But curiously enough, after the lapse of ninety years, the suggestion of Hamilton in regard to the assignment by creditors to a State, who could not themselves sue in the Federal Courts, to parties who could sue the State in those Courts, has been acted upon.

"In the cases of New Hampshire v. Louisiana and New York v. Louisiana, reported in 108 U. S., 76, this precise question was brought up. Although the jurisdiction to sue a State in the Courts of the United States by the citizens of another State, or by citizens or subjects of any foreign State, was abolished by the Eleventh Amendment, there yet remained the right of one State to sue another. Certain creditors, therefore, of the State of Louisiana, who could not sue that State themselves, transferred by assignment the

evidence of their indebtedness, some to the State of New Hampshire and others to the State of New York, and these States brought suits in the Supreme Court of the United States against the State of Louisiana upon those obligations.

"The Court, after a very elaborate argument, decided that these actions could not be sustained; that 'the evident purpose of the amendment, so promptly proposed and adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be sued, and that one State can not create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution by assuming the prosecution of debts owing by the other State to its citizen.'"

See also Mr. Davis' note on pages 652 and 653 of the same book:

"This amendment, which relates to suits against States, has been already fully considered both in the lectures and in the notes upon them. Chisholm v. Georgia was the direct and impelling cause for it. The States came out from the war of the revolution burdened with debt. Although Congress had made provisions for taking care of a part of that debt, a large amount was still outstanding. When they learned that a State could be sued in the Federal Courts, they hurried to make that an impossibility thereafter, Massachusetts taking the lead. The Eleventh Amendment, which effected that result, was proposed by Congress March 5, 1794, and was proclaimed January 8, 1798. It is a little remarkable that the decision which made it necessary should have been practically overruled nearly a hundred years after it was made."

Judson, *Constitutional History and Government of the U. S.*, 255.

Certainly one of the chief purposes of the people in adopting the Eleventh Amendment was to prevent States from being compelled to pay debts due to individuals, and on which they had no idea they could be sued at the time the loans were made, and if a debt which has been disavowed or repudiated can be collected by giving it to a State, the Eleventh Amendment becomes a dead letter. Individuals can enforce a substantial compromise by threat of assignment, or, as we think is attempted to be done in this case, enforce payment by giving a State a substantial commission for collecting the bonds.

To permit that would be to "keep the word of promise to the ear and break it to the hope," and in all human probability, to call into existence a new business of vast and unforeseen consequences, compounded of blackmail and barratry, which will scarcely make for concord and harmony among the sisterhood of States.

It will, of course, not be possible to confine this extension of jurisdiction to the disavowed public securities of the States, but it will with equal reason extend to all claims against States, contractual and non-contractual, which individuals may assert, and, being denied, may assign to a State enlisted in this novel and gainful enterprise; and we may expect soon to find the docket of this Court congested with such actions. What, then, becomes of the reserved rights of the States to manage their own domestic affairs in their own way? Nor is this a fanciful picture; there is scarcely any State which may not be thus called to the bar of this Court, even the great Commonwealth of Massachusetts, for we find, upon looking into the Supreme

Court Reports of that State, that claims have been made whi
that Court regarded as just, as between man and man, but whi
it could not enforce against the State for lack of jurisdiction.

Murdock Grate Co. v. Com., 152 Mass., 28.

That there is no absolute necessity for such jurisdiction
this Court is shown by the fact that we have lived for more tha
a century without its exercise; that it does not exist is made pro
able by the fact that it has not previously been invoked, a
though the circumstances which gave rise to it have existed fro
the beginning. The novelty of an action, under such circum
stances, is strong evidence that it is groundless.

Chief Justice Chase in *Miss. v. Johnson*, 4 Wall
475, 500.

Lord Bramwell in *Mogul Case* (1892), A. C., 25.

This view is well presented in a thoughtful article by Car
mon F. Randolph, Esq., in the May (1902) number of the
Columbia Law Review, entitled "Notes on Suits Between
States."

**III. If suits can be brought against a State upon
bonds so assigned to another State, the present suit
cannot be maintained, because it is a suit by the State
of South Dakota and Charles Salter, representing all
individual bondholders of the same class, against the
State of North Carolina and Simon Rothschilds, repre-
senting all of the first mortgage bondholders.**

Of course this is not the form in which the parties have
been arranged by the complainant in the pleadings, because, if
it had been, the Court would probably have refused to permit

the filing of the bill at all. Such, however, is, in effect, in substance, if not in form, this suit.

If we look at things and not at names, at substance and not at forms, as courts of equity always do, this is manifest.

This rule is especially applicable to parties and pleadings. In *1 Daniel's Chancery Practice* (6th A. Ed.), 191, note, it is said:

> "All persons having the same interest should stand on the same side of the suit, but if any such refuse to appear as plaintiffs, they may be made defendants, *their refusal being stated in the bill.*"

Under the Judiciary Act of 1789, which provided—

> "That the Circuit Courts shall have original cognizance, concurrent with the Courts of the several States, of all suits of a civil nature at common law, or in equity, where * * * the suit is between a citizen of the State where the suit is brought and a citizen of another State,"

the Court looked only to the arrangement of the parties on the record (*Coal Co. v. Blatchford,* 11 Wall., 172), but under the subsequent Act of 1875—and in this respect the present act is substantially similar—which provided:

> "That the Circuit Courts of the United States shall have original cognizance, concurrent with the Courts of the several States, of all suits of a civil nature and at common law or in equity, * * * in which there shall be a *controversy* between the citizens of different States,"

the Court will arrange the parties according to their real interest in the controversy, in order to ascertain whether it is one

between citizens of different States, and, consequently, whether the Court has jurisdiction of the cause (*Removal Cases*, 100 U. S., 457; *3 Rose's notes*, page 850). So, when the Constitution confers on this Court jurisdiction to hear and determine "controversies between two or more States," and "between a State and citizens of another State," the Court ought to look beyond the forms adopted by the pleader to the facts in order to ascertain between whom the *controversy* really exists.

It is true that in *Osborne v. The Bank*, 9 Wheat., 739, Chief Justice Marshall said that, in order to ascertain whether a State was sued, the Court would look only to the parties on the record, but that proposition has been overruled, and it is now settled law that, in order to ascertain whether a suit is being prosecuted against a State—to learn who is the real defendant—the Court will look beyond the record to see what will be the result of the suit. (*In re. Ayres, 123 U. S.*, 443). So, we think when the question is: is the suit one by an individual against a State? who is the real plaintiff? the Court will look beyond the record to the result.

Indeed, that is the rule applied by this Court in removal cases when the question is whether a State is the real plaintiff.

> *Missouri and Ry. Co. v. Mo. Rd., etc., Commrs.*, 183 U. S., 53.

If that is done, it will be found that the real controversy is: "The State of South Dakota and Charles Salter, representing himself and all individual holders of second mortgage bonds, against The State of North Carolina and Simon Rothschilds,

representing himself and all other holders of the first mortgage bonds." So arranged, would this Court have jurisdiction of the cause? We think not. Such a suit was not within the grant of jurisdiction by the Constitution as originally adopted.

In *California v. Southern Pacific Co.*, 157 U. S., 261, Chief Justice Fuller, speaking of the original jurisdiction of this Court, said:

> "The jurisdiction is limited, and manifestly intended to be sparingly exercised, and should not be expanded by construction."

When a State consented to be sued by another State in a proper controversy, it clearly did not *expressly* consent to be sued by such State *and an individual* (either directly or indirectly), and to hold that it did, would seem to require a decidedly expansive construction.

Such is the expressed opinion of Mr. Justice Curtis, who, in in *Florida v. Georgia*, 17 How., 478, on page 504, said:

> "The State of Georgia has consented to be sued by one or more States, or by a foreign State, and by no other person or body politic. The State of Georgia has consented to stand joined as a defendant with one or more States, or with a foreign State, and with citizens or subjects of a State other than the one bringing the suit, but with no other person or body politic. Certainly there is no power existing in this government to enlarge that consent so as to embrace in it anything to which it does not, by its terms, extend."

Again, in the Circuit Court, it is settled that the Court has no jurisdiction unless each one of the plaintiffs, arranged ac-

cording to their real interest, can maintain a suit against each one of the defendants, arranged according to their real interest in the controversy.

Removal Cases, 100 U. S., 457.
Strawbridge v. Curtiss, 3 Cranch., 267.
Smith v. Lyon, 133 U. S., 319.

In *New Orleans Pacific Railway v. Parker*, 143 U. S., 58, 59, it is said:

> "If a single bondholder has any right at all to institute proceedings, he is bound to act for all standing in a similar position, and not only to permit other bondholders to intervene, but to see that their rights are protected in the final decree."

And it has been held that if a suit is instituted between competent persons, others having the requisite interest are entitled to intervene, and if they do intervene, and do not have the requisite diversity of citizenship, the jurisdiction of the Court is ousted.

Mangles v. Donan Brewing Co., 53 *Fed. Rep.*, 515.
Cook on Stockholders (3d Ed.), sec. 827, note 2.
Morris v. Gilmer, 129 U. S., 315.
67 *Fed. Rep.*, 625.
Consolidated Water Co. v. Babcock, 76 *Fed. Rep.*, 243, 248.

Board of Trustees v. Blair, 70 *Fed. Rep.*, 416, 417.

If this be required merely because the Judiciary Act only confers jurisdiction on the Circuit Court of controversies be-

tween the citizens of different States, *a fortiori,* ought it to be so held when the Constitution confers jurisdiction upon this Court only of "controversies between two or more States"? and, in addition to that, the *Eleventh Amendment expressly prohibits suits by individuals against a State.*

Nor is it possible to escape the force of this argument by saying that the individuals are not necessary parties to the suit. It would scarcely lie in the mouth of the complainant to say this, because she has elected to bring the suit in the present form and with the present parties, but, if she did, the objection would be futile, because they are necessary parties.

Surely, the first mortgage bondholders are necessary parties, because there is a demand that the lien of the first mortgage bondholders be declared subordinate to that of the second mortgage, or, failing that, that it be declared due and payable so as to entitle the second mortgage bondholders to a sale of the stock freed from all liens.

All second mortgage bondholders are necessary parties because the pleadings put in issue the existence and priority of the first mortgage lien, the legality of the second mortgage bonds and the validity of the alleged mortgage by which they are claimed to be secured, and the determination of these questions necessarily affects all of the second mortgage bondholders.

In *California v. Southern Pacific Co.,* 157 U. S., 229, 257, Chief Justice Fuller, delivering the opinion of the Court, says:

> "We have no hesitation in holding that when an original cause is pending in this Court to be disposed of here in the first instance, and in the exercise of an

exceptional jurisdiction, it does not comport with the gravity and finality which should characterize such an adjudication to proceed in the absence of parties whose rights would be, in effect, determined, even though they might not be technically bound in subsequent litigation in some other tribunal."

Minnesota v. Northern Securities Company, 184 U. S., 199.

We may safely conclude, then, that no Court has jurisdiction of an action brought by a State *and an individual against another State, first, because it is not within the original grant of judicial power; and second, because it is forbidden by the Eleventh Amendment.*

But whether the parties be re-arranged according to their real interest in the controversy or not, the result of a successful prosecution of this suit will equally be to enable the individual holders of the second mortgage bonds to collect them from the State by suit against her consent, contrary to the provisions of the Eleventh Amendment.

That such would be the result can not be denied; that it contravenes the spirit of the Eleventh Amendment is equally true; and that it is forbidden by that Amendment we earnestly maintain.

The general rule for the construction of a constitutional provision is so to construe it as to subserve its general purpose (*Legal Tender Cases*, 12 Wall., 531), and, in its later decisions, this Court has applied that rule with liberality to the Eleventh Amendment.

Fitts v. McGhee, 172 U. S., 516, 528.

In the *Va. Coupon Cases*, 114 U. S., 332, Mr. Justice Bradley, delivering a dissenting opinion on behalf of himself, the Chief Justice and Justices Miller and Gray, said:

> "Moreover, the Eleventh Amendment is not intended as a mere formula of words, to be slurred over by subtle methods of interpretation, so as to give it a literal compliance, without regarding its substantial meaning and purpose. It is a grave and solemn condition, exacted by sovereign States, for the purpose of preserving and vindicating their sovereign right to deal with their creditors and others propounding claims against them, according to their own views of what may be required by public faith and the necessities of the body politic. We have no right, if we were disposed, to fritter away the substance of this solemn stipulation by any neat and skillful manipulation of its words. We are bound to give it its full and substantial meaning and effect."

And in the subsequent case of *Hans v. Louisiana*, 134 U. S., 1, which was an action by a citizen of that State against her, the action was dismissed as not being within the grant of judicial power and against the spirit and purpose of the Eleventh Amendment, and Mr. Justice Bradley, on page 15, said:

> "The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own State in the Federal Courts, whilst the idea of suits by citizens of other States, or foreign States, was indignantly repelled? Suppose that Congress,

when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States; can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face."

This language is equally applicable to the present suit.

When we remember the excitement and indignation caused by the decision in *Chisholm's case,* and the promptitude and unanimity with which it was overruled by the passage of the Eleventh Amendment, it is not reasonable to suppose that it was intended to permit States to be sued by individuals—to allow States to be coerced into the performance of obligations to individuals by suits—by the simple device of assigning a part of the claim held by the individual to a State and letting that State sue, making the individual—the real plaintiff—a co-defendant with the State. The Constitution prohibits *things,* not *names.*

Craig v. Missouri, 4 Peters, 410, 435.

In *Parlement Belge,* 5 L. R. P. D., 197, a libel *in rem* was filed in the Court of Admiralty of Great Britain for damages for collision against the Parlement Belge, an unarmed packet, the property of the King of the Belgians. No appearance was entered for defendant, but the Attorney-General filed an information and protest against the Court taking jurisdiction, because it was a suit against a foreign sovereign. It was argued that the suit was not against the sovereign, because he was not personally made a defendant, but in the judgment delivered by

Lord Esher, it was held (page 219) that that which could not be done directly could not be done indirectly—that the immunity of a sovereign from suit was not so easily to be destroyed—and the action was dismissed.

See also:

Cunningham v. M. and B. R. R., 109 U. S., 446.
Mighell v. Sultan of Johore (1894), 1 Q. B., 149, 154.
Jarbolt v. Moberly, 103 U. S., 580, 585.

In the argument of *Ex parte Garland*, 4 Wall., 334, 338, counsel for petitioner (Messrs. Reverdy Johnson and M. H. Carpenter) said:

> "In discussing the constitutionality of any law of Congress (or any other act), the real question is, would the act accomplish a result which the Constitution forbids? If so, no matter what may be the form of the act, it is unconstitutional."

In *Blacklock v. Small*, 127 U. S., 96, Jacob Small, a citizen of the State of South Carolina, executed a bond to Blacklock for the sum of $10,600 and mortgage to secure the same upon certain property in said State.

Blacklock assigned and transferred for value the bond to Alex. Robertson, in trust for the three children of Blacklock, Emma Jane Blacklock, Mary Blacklock and Helen Robertson Blacklock. Small pretended to pay the bond and mortgage to Robertson in the notes of the Confederate States, and Robertson satisfied the mortgage of record and delivered up the bond to Small.

Two of the children of Blacklock, Emma Jane and Mary, being citizens and residents of the State of Georgia, brought a bill in equity in the Circuit Court of the United States against Small, a citizen of South Carolina, Robertson, a citizen of North Carolina, and Helen Robertson Blacklock, a citizen of South Carolina, for the purpose of annulling the payment of the bond in Confederate notes, the satisfaction of the mortgage, and the re-establishment and foreclosure of the said mortgage lien.

Small interposed a plea to the jurisdiction because the plaintiffs, as well as himself, were citizens of South Carolina when the bill was filed. This plea was overruled. Small answered, as did also Robertson. The defendant Helen Robertson Blacklock put in an answer admitting the allegations of the bill, and generally joined with the plaintiffs in the prayer for relief.

This Court decided that the Circuit Court was without jurisdiction, and directed it to dismiss the bill, Mr. Justice Blatchford delivering the opinion of the Court, on page 104, said:

> "There is another difficulty in the case, on the question of jurisdiction. The bond was a unit; the mortgage was a unit; and the assignment of the bond by Blacklock to Robertson, in trust for the children of Blacklock was a unit. The bond can not be enforced against Small, nor can the mortgaged premises be sold, in favor of the two plaintiffs alone. *The relief asked in the suit must necessarily be* for the benefit of the defendant Helen Robertson Blacklock, as well as for the benefit of the plaintiffs, especially as, by her answer, she arranges herself on the side of the plaintiffs as against Small, joins in the prayer of the bill, and

asks that the payment of the bond and the satisfaction of the mortgage be declared void, and that the bond and mortgage be declared valid in the hands of Robertson, as trustee for the benefit of herself and the plaintiffs, and that Small be decreed to pay to herself and the plaintiffs the amount of money secured by the bond and mortgage, with interest. The suit is, therefore, shown to be one substantially by and for the benefit of Helen Robertson Blacklock, and the proofs show that, at the time of the commencement of the suit, she was and has since then always continued to be, a citizen of South Carolina, of which State Small was and is a citizen."

To sustain this action and to give judgment in accordance with the prayer of the bill will, we submit, be to accomplish an unconstitutional result, and that by indirection.

We contend further:

That this suit is commenced and prosecuted by, or for the benefit of, individuals.

The case of *New Hampshire v. Louisiana,* 108 U. S., 76, establishes the proposition that an individual can not invoke the original jurisdiction of this Court in a suit against one State by using the name of another State—that a State can not maintain a suit against another State on behalf of private individuals.

In that case, the Chief Justice, on page 89, said:

"No one can look at the pleadings and testimony in these cases without being satisfied, beyond all doubt, that they were, in legal effect, commenced, and are now prosecuted, solely by the owners of the bonds and coupons."

We insist that the same thing can, with equal propriety, be said of the pleadings and testimony in this case.

Of course, the scheme is not so transparent as in those cases, because, apparently, it was there thought that the legal title to the bonds was alone necessary to entitle the State of New Hampshire to maintain the suit; just as, in this case, it seems to be supposed that all that is necessary to enable a State to maintain such a suit—and that it was so decided in those cases—is that she should be the actual owner of the bonds; whereas, in our view, *the principle established by those cases is that, by no scheme or contrivance, can a suit be commenced or prosecuted which, in effect, is a suit by individuals against a State.* And such this suit clearly appears to be.

Simon Schafer and his brother Samuel Schafer, a firm of brokers in the city of New York, own and practically control all of the bonds of the class sued on (record, page 65). Indeed, they purchased eight of these bonds after they had been sent to the State of North Carolina for refunding, and had been marked as cancelled. (Record, page 66). All of the bonds of this class are claimed to be secured by a lien upon the State's stock in the North Carolina Railroad Company, so that a foreclosure must be on behalf of all the creditors. The Schafers declined to accept the offer of the compromise made by the State of North Carolina, and which was accepted by the great majority of the holders of those bonds (and which compromise alone enabled the State to resume the payment of the interest on its debt); they employed, directly or indirectly, nu-

merous counsel; they petitioned the General Assembly of North Carolina in March, 1901, to make provision for the payment of these bonds, which was rejected, and soon thereafter, to-wit, in the latter part of the month of March, 1901, an act was passed by the Legislature of South Dakota authorizing the acceptance by the State of donations, and empowering the Attorney-General to sue to collect the same, and that Mr. Marion Butler, at the time a Senator from North Carolina, was spoken to in the fall of 1900, and *became counsel for the Schafers* as early as January, 1901, and induced his friend, Senator Pettigrew, of South Dakota, to use his influence to have this act passed (record, page 180); that the act came from the committee of which Mr. R. W. Stewart, solicitor for complainant, was a member; that Governor D. L. Russell, leading counsel of record for the individual bondholders, says in his testimony that he may have discussed with other lawyers the feasibility of assigning a portion of these bonds to a State in order to enable that State to sue and collect the bonds for the other holders.

Governor Russell's testimony on that point is as follows:

> "Q. Did you have any information from any source whatever, from any parties whatever, prior to the time you were employed as counsel for any of the holders of the second mortgage bonds, that it was in contemplation by any parties or persons whatever to so place a portion of the said mortgage bonds as to enable some State to bring action, or a suit in the Supreme Court of the United States against the State of North Carolina to recover the said second mortgage bonds?
>
> "(Same objection on part of counsel for complainant.)
>
> "A. Oh, I might have heard some such talk; the matter was discussed, I remember having some talk

with Mr. Busbee about it; well, I guess that was in March, too, or April, 1901.

"Q. Do you know at whose suggestion a bill was introduced in the Legislature of South Dakota in 1901, to enable that State to accept or receive a gift of any of the second mortgage bonds, or of any bonds, and what the purport of that bill was?

"(Same objection on part of counsel for complainant.)

"A. Oh, I think I heard Colonel Stewart, of South Dakota, and possibly Mr. Burke, say that they had the bill introduced, or that one of them had introduced it, or something of that sort.

"Q. I will ask you if you did not, at the same time, learn that the chief purpose of that act was with a view to receive from the Schafers a donation of the bonds now in suit, and with a view of bringing a suit against North Carolina to recover?

"(Same objection on part of counsel for complainant.)

"A. Oh, it is not improbable that such an inference was made; it may be that such conclusion was inferential from what they said.

"Q. Do you know, Governor, that the bill was going to be introduced in the Legislature of South Dakota before it was done?

"(Same objection.)

"A. I think I did hear it mentioned.

"Q. Did you know that Simon Schafer was going to donate ten bonds to the State under that bill?

"(Same objection.)

"A. Did I? No, sir, I did not know that he was going to do it, and, indeed, I am quite sure, or I have reason to believe, at least, that he was not willing to do it until about March, 1901.

"Q. Well, did you know why Simon Schafer was not willing to do it before that date?

"(Same objection.)

"A. Well, yes, I knew. I know what he said, but I shall not state what he said for reasons already given." See record, pages 108-109.

Governor Russell further testifies that his impression is that Mr. Peckham, counsel for complainant, was employed or consulted with regard to these second mortgage bonds some time in March, 1901 (record, page 104), and *the bonds were not given to the State of South Dakota until September 21, 1901.*

It further appears from the testimony of Samuel Schafer that Simon Schafer was the member of the firm who had the active management of these bonds, and that he is dead; that he had no interest whatever in the State of South Dakota, financial or personal, and probably never had visited that State (record, page 73). That Simon Schafer gave ten out of a total of about two hundred and fifty of these bonds to the State of South Dakota, because, as he explained to his brother Samuel, when the latter objected to the gift of those bonds, the gift would probably inure to the benefit of their remaining bonds (record, page 74). It further appears that the bonds were delivered, as said above, on September 21, 1901, through Congressman Burke.

Mr. Burke says that Mr. Pettigrew induced him to use his influence to have the act passed, assuring him that other States had done so, and that the State of South Dakota might thereby obtain donations, including some Southern bonds. It is evident that Mr. Pettigrew did not disclose much of the

scheme to Mr. Burke, but did say that a suit on the bonds might be necessary.

Mr. Burke further says that in a conference had between himself, Governor Herried and Colonel Stewart, before suit was brought, but he thinks after delivery of bonds, although not positive as to that, something was said about the necessity of a suit; that no demand was made by the authorities of South Dakota upon the State of North Carolina for the money, nor any effort made for an adjustment of the claim, but almost immediately after the donation, suit was brought in this Court against the State of North Carolina, and the first notice which that State had of the alleged ownership of the bonds was a statement in the newspapers that application had been made to file such a bill in the Supreme Court of the United States!

Governor Herreid says, in explanation of this strange conduct, that the negotiations were had between Congressman Burke, representing the Schafers, and Attorney-General Pyle, who is dead, and that he, the Governor, knew little about the matter, but assumed that Mr. Pyle would do what was proper and necessary in the premises, but he admits that he understood that a suit would probably be necessary to recover the money, and he understood that Col. R. W. Stewart had already been employed to assist Mr. Pyle at the time when the donation was made (record, page 36). And the letter to Hon. Charles H. Burke, in which the donation was made, and which was put in evidence by the complainant (record, page 39), and handed by Mr. Burke to Governor Herreid at the time of the donation

of the bonds, and containing the conditions upon which the donation was made, contains this sentence:

> "The holders of these bonds have been advised that they can not maintain a suit against the State of North Carolina on these bonds, but that such a suit can be maintained by a foreign State, or by one of the United States."

It further appears that the bonds which were owned by the defendant Charles Salter have been and are under the control of the Schafer Bros. That Simon Rothschilds, who is made defendant as representing the first mortgage bondholders, has only two of those bonds and sixteen of the class owned by the complainant and Schafer Bros., and that his sixteen are in the custody and control of the Schafers.

The prayer of the bill asks for an accounting of all of the bonds, and in default of payment, a sale of the stock to pay all bonds, *and the answer of Charles Salter, the representative of the Schafers,* admits the allegations of the bill and asks that it be dismissed unless the Court will decree not only in favor of the complainant, but in favor of all of the individual holders of the so-called second mortgage bonds.

Is it not clear from this brief recital that the Schafers are the actors, the moving spirits, the real plaintiffs, in this suit? Can any one read the pleadings and testimony without seeing that this suit is instituted in pursuance of a scheme invented by the Schafers, or their counsel, to collect these bonds by hiring the State of South Dakota to bring the suit, instead of simply employing lawyers, as has been the practice heretofore with those wishing to institute legal proceedings?

We submit that it is not necessary that the donee—the State of South Dakota—should be shown to have participated consciously in this wicked scheme—although the only persons by whom the truth of the matter could be shown *are either dead or shield themselves behind the privilege of attorney and client,* Governor Herreid and Mr. Burke evidently being kept in the dark, as they could not so hide—it is sufficient that she, being a mere volunteer, should become the passive instrument of the bondholders in carrying out their scheme.

We respectfully insist that the suit was commenced, and is prosecuted, *solely* for the benefit of the private bondholders, and in the event of recovery they are the *sole beneficiaries,* after deducting, of course, the expenses of the suit, including the fee to South Dakota. We can not believe that the prohibitions of the Eleventh Amendment can so easily be nullified.

ON THE MERITS.

The defendant, the State of North Carolina, contends:

First—That these bonds were disposed of contrary to the provisions of the enabling statute (chapter 228 Acts 1854-'55) and are, therefore, illegal and uncollectable.

Second—That the provisions of the law (Chapter 106, Acts 1866-'67) authorizing the second mortgage upon the stock of the State for the security of the aforesaid bonds was not complied with, and hence there is no valid mortgage securing the said bonds, or any of them.

First—The bonds were issued contrary to the provisions of the enabling statute, and are illegal.

No one, however unacquainted with the strenuous efforts and manifold sacrifices which the State of North Carolina made to secure connection between the eastern seaboard and the transmontane sections of the State, can read the charter of the Western North Carolina Railroad and the other acts with reference thereto, printed in the record, without seeing that it was the chief purpose of the State to secure the building of this railroad as speedily and with as little outlay as possible. To accomplish this, it was evidently thought best to make the donation to the Western North Carolina Railroad in cash, and not in bonds, and hence it was provided that the public Treasurer should advertise in one or more newspapers and invite sealed proposals for such amount of the bonds as might be necessary to sell at one time, but in no event were the bonds to be sold for less than their par value. If they brought more than par, the surplus was to be turned into the State Treasury.

The legislation upon that subject is as follows:

Laws of 1854-55, chapter 228, An act to incorporate the Western North Carolina Railroad Company.

* * * * * * * * *

"SEC. 8. Be it further enacted, that whenever it shall appear to the Board of Internal Improvements of this State, by a certificate signed and sealed by said General Commissioners, or a majority of them, that the sum of three hundred thousand dollars has been subscribed for and taken, and the five per cent paid in thereon, the said Board of Internal Improvements shall be, and they are hereby authorized and required to direct the Treasurer of the State to subscribe on behalf of the State for the stock in said company to the

amount of six hundred thousand dollars in the capital stock of said company."

* * * * * * * * *

"SEC. 35. Be it further enacted, that as soon as it may become necessary to borrow the money for the payment of the subscription by this act authorized, the public Treasurer shall issue coupon bonds, signed by himself, and countersigned by the Comptroller, in sums not less than five hundred dollars each, pledging the State for the payment of the sum therein mentioned, with interest thereon at the rate of interest not exceeding six per cent per annum, payable semi-annually, at such times and places as the Treasurer may appoint, the principle of which bonds shall be redeemable at the end of thirty years from the time the same were issued; but no greater (number) of such certificates shall be issued at any one time than may be sufficient to meet the installments required to be paid by the State at that time."

* * * * * * * * *

"SEC. 37. Be it further enacted, that so soon as it shall become necessary to issue the bonds aforesaid, the public Treasurer shall advertise in one or more newspapers, as he may think best, and invite sealed proposals for such amount of the aforesaid subscriptions as may be wanted at any one time, and it shall be his duty to accept those terms which may be most advantageous to the State: *Provided*, that in no event shall any of the said bonds be sold for less than their par value; and any premium which may be obtained on the sale of said certificates shall be placed in the public treasury and used as other public funds, and kept or invested to pay the interest on the debt hereby authorized."

The evidence of Dr. Battle (record, pages 83, 84), shows that advertisement was made; that no sealed proposals for the bonds were received; that the bonds were not sold at all, but that

they were turned over to the railroad company, and that the railroad company gave receipts for them. (See record, page 84.) And the railroad company sold the bonds through brokers at prices ranging from twenty-three to sixty-seven per cent of their face value. This testimony of Dr. Battle, Treasurer of the State at the time, is corroborated by that of Dr. J. J. Mott, at one time President of the Western North Carolina Railroad, who sold a portion of these bonds.

Counsel attempted to show that this method of disposing of the bonds was regular and legal, because it amounted to a purchase of a certain amount of stock in the Railroad for that amount of the State bonds, but it is manifest that the State was not dealing with this railroad upon commercial terms. Dr. Battle and Dr. Mott both say that no actual subscription was ever made, other than that which appears in the statutes relative to the subject, by any one on behalf of the State of North Carolina, upon the books of the Western North Carolina Railroad Company, and both Dr. Battle and Dr. Mott properly regarded the provision of the law for the issue and sale of the bonds as an appropriation, or donation, by the State to the railroad company.

We do not think that it would require argument to show that the method of disposing of the bonds was contrary to the provisions of the statute, because they were not sold by sealed proposals and for par; indeed, they were not sold at all, and, as between the State and the railroad company, the first taker, were illegal and void.

But we understand the position of complainant to be that whether the bonds were illegally issued and sold or not, is immaterial, because complainant is a holder for value in due course.

If this be true, it must be, of course, through the merit of some antecedent holder, for complainant not only took the bonds after their maturity, but paid nothing for them.

Admitting freely the presumptions in favor of a holder of negotiable paper, yet we understand the law to be that when proof has been given of fraud or illegality in the issue of paper, the burden is cast upon complainant to show that she is a purchaser for value without notice and in due course.

Smith v. Sac County, 11 Wall., 139.
Combs v. Hodge, 21 How., 397.
Collins v. Gilvert, 94 U. S., 753.
Stewart v. Lansing, 104 U. S., 505.

As these bonds were issued and disposed of contrary to the provisions of the enabling statute, they were illegal, and this fact, together with the admitted fact that complainant received the bonds as a donation, and after their maturity, casts the burden of proof upon her to show that some one of her predecessors in title were innocent purchasers for value, and this we submit she has not done.

As previously said, it appears from the testimony of Dr. J. J. Mott and Mr. H. C. Cowles (record, pages 94-102) that these bonds were sold by the Western North Carolina Railroad Company, to which they had been improperly turned over, at from twenty-three to sixty-seven per cent of their face value, and that they were not sold until some time after the first coupons had

become due. It appears from the exhibits that the first coupon on the ten bonds held by complainant is due January 1, 1869; that is, that some of the interest coupons have been cut from the ten bonds held by complainant, but all the rest are still attached thereto.

It also appears from the testimony of Mr. Schafer (record, page 68), that he and his brother had had these bonds for about thirty years; that is, they were purchased about 1872; and that no interest had been paid upon any of these bonds so far as he knew.

The burden being upon the complainant to show that they, or their assignor, took the bonds free from all infirmities, we insist that we have a right to infer from this testimony that when the Schafers purchased these bonds in 1872, they purchased them with all interest coupons attached thereto, due from January 1st, 1869, until January 1st, 1872, inclusive, and that they were purchased at a small percentage of their face value.

Do the facts that the Schafers, who are the only persons whose title complainant rests upon, purchased these State Bonds with over-due interest coupons attached and at a small percentage of their face value, deprive them of the protection given to *bona fide* purchasers for value in due course? We think they do.

In *Hulbert v. Douglas*, 94 N. C., 122, the Supreme Court of North Carolina held:

> "If the endorsee of a negotiable instrument before its maturity, knew, or if such facts came to his knowledge, which, if inquired into, would have informed

him of an equity of the maker, he takes the instrument *cum onere.*" See also *Farthing v. Dark,* 109 N. C., 291.

This Court, in *Parsons v. Jackson,* 99 U. S., 434, said, on page 444:

> "Our opinion is, that the appellant had abundant cause to question the integrity of these bonds; that they were effected with notice of their invalidity, and can not be allowed to sustain the position of *bona fide* holders without notice. The presence of the past-due and unpaid coupons was itself an evidence of dishonor, sufficient to put the purchasers on inquiry."

See *Rose's Notes, Volume 9,* page 737.

In the subsequent case of *Railway Company v. Sprague,* 103 U. S., 756, commenting on the case of *Parsons v. Jackson,* the Court, on page 762, said:

> "It is true the Court said that the presence of the past-due and unpaid coupons was of itself an evidence of dishonor sufficient to put the purchaser on inquiry.
>
> "But the case did not turn on this circumstance alone. There were other significant indications of the invalidity of the bonds, and the opinion must be restricted to the case before the Court.

In *London Joint Stock Bank v. Simmons* (1892), A. C., 201, Lord Herschell, discussing the question of what constitutes "good faith" in a purchaser of negotiable securities, said, on page 221:

> "One word I would say upon the question of notice, and being put upon inquiry. I would be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments. But regard to the facts of which the taker of such instruments had notice is most material in considering whether he took in good faith. If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith, if he shuts his eyes to the facts presented to him and puts his suspicions aside without further inquiry."

Applying this rule, we do not think the Schafers (for under the evidence, we have to deal with their title alone) are entitled to the position of holders for value without notice.

Different to the bonds referred to in the cases of Railway Company v. Sprague and Parsons v. Jackson, *supra*, these were State bonds; were purchased at a very small percentage of their value and with over-due interest coupons attached.

Clearly these circumstances were sufficient to put a reasonable person upon notice that something was wrong with the bonds, and if inquiry had been made and an examination of the statutes authorizing the bonds, it would have appeared that they were not issued in accordance with the provisions of that statute, and we respectfully insist, brings this case within the principle of the decision of *Trask v. Jacksonville, etc., R. R. Co.,* 124 U. S., 515.

In that case, Chief Justice Waite, in discussing the question whether one Coddington was a *bona fide* holder of bonds, said, on page 517:

"As the bonds were State bonds, the mere fact that no interest had ever been paid, furnished the strongest presumptive evidence that they were dishonored."

But if we are wrong in this and the Court should be of opinion that the Schafers were *bona fide* holders for value, we submit that, as the bonds were not suable in their hands, they ought not to become suable in the hands of a transferee unless that transferee took them for value and without notice of dishonor; *even if such controversies are within the jurisdiction of this Court.*

As we have hereinbefore attempted to show, a transferee has no higher or further rights than the transferer, unless in the exceptional cases under our recording acts and negotiable paper taken for value before maturity and without notice.

To permit the State of South Dakota to collect these bonds by suit, whether they were illegally issued or not, will be to add another exception to the rule that a man can not give what he does not own or possess.

Second—The provisions of the law (Act 1866-'67, chapter 106) authorizing a mortgage upon the State's stock in the North Carolina Railroad in favor of the holders of the bonds of the class sued on were not complied with, and the mortgage is invalid.

The provision is as follows:

"Section 1. Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by authority of the same, that the Public Treas-

urer be and he is hereby authorized and directed, whenever it shall become his duty under the provisions of said acts, passed at the session of 1854-'55 and 1860-'61, to issue bonds of the State to the amount of fifty thousand dollars or more, to mortgage an equal amount of stock which the State now holds in the North Carolina Railroad, as collateral security for the payment of said bonds, and to execute and deliver, with each several bond a deed of mortgage for an equal amount of stock to (of) said North Carolina Railroad, said mortgage to be signed by the Treasurer and countersigned by the Comptroller to constitute a part of said bond, and to be transferable in like manner with it, as provided in the charter of said Western North Carolina Railroad Company; and further, that such mortgage shall have all the force and effect, in law and equity, of registered mortgages without actual registry."

It is clear that the statute contemplated and promised a mortgage lien upon ten shares of stock for each bond of the par value of one thousand dollars, and not a second mortgage upon the whole of the State's stock in the North Carolina Railroad Company.

At the time when these bonds were issued and the endorsement thereon made by the Treasurer, the State owned a certain proportion of the capital stock of the North Carolina Railroad, but no certificates of stock had ever been issued to the State (Dr. Battle's testimony, record, page 83); and, according to the allegations of the bill and the testimony, the State owned stock in the North Carolina Railroad Company of the par value of three millions of dollars, and issued bonds of the class sued on only to the amount of the par value of two million five hundred thousand dollars.

The most casual reading of the endorsement upon the bonds, purporting to give a statutory mortgage upon the State's stock, will show that no stock was designated or described in such way as to be capable of identification, and, therefore, we respectfully submit, no particular stock has been subjected to the lien of a mortgage.

It is evident, and we admit, that the statute authorized a mortgage in favor of the holders of the bonds, but it has never been executed, and therefore the only claim which the holders of the mortgage have against the State is, not a *lien* upon any particular stock owned by the State, but *a cause of action* for the breach of contract to give the mortgage.

In North Carolina, and we assume the validity of the mortgage is to be determined by that law, it is settled, in accordance with the general principles of the law, that a mortgage purporting to be upon a certain number of things, out of a larger number, and in no other wise designated, is invalid as a mortgage.

Waldo v. Belcher, 11 Ired. L., 609.
Blackley v. Patrick, 67 N. C., 40.
Stevenson v. Railroad, 86 N. C., 455.
Holmes v. Whitaker, 119 N. C., 113.
Jones on Chattel Mortgages, sec. 56.
Kilgore v. New Orleans Gas Co., 2 Wood, 144.

Nor is the claim on behalf of the mortgage stronger in equity than at law, because in order to constitute an equitable mortgage, it is equally necessary to identify the subject-matter.

Halroyd v. Marshall, 10 H. L., 189.

Walker v. Brown, 165 U. S., 654.

19 Enc. of Law, page 14, and authorities.

The same rule prevails in actions for the specific performance of a contract.

See *Lighthouse v. Third National Bank,* 162 N. Y., 336.

And we understand the law to be the same, whether the alleged mortgage be statutory or conventional.

In *Jones on Liens,* sec. 106, it is said:

> "A statutory lien can exist only when it has been perfected in the manner prescribed by the statute authorizing it. Thus, under an act which created a building association and provided that the shares of stock should, from the date thereof, be a lien on the real and personal estate of the corporation, it was held that the mere payment of the subscription for shares without their being actually issued, did not create a lien on the property of the Association. The subscriber became entitled to the rights of a stockholder in the Association by such payment, but the lien did not necessarily flow from the relation of stockholders to the Association. It was necessary under the statute that the stock should be actually issued in order to create a lien which could be enforced against other encumbrances, for the statute declared that the stock should be a lien only from the date of the certificate."

See also *Tycross v. Dreyfus,* 5 Ch. Div., 605.

We think, therefore, that the complainant has no lien upon any property, and her only right of action, if any, is for damages for breach of contract, and this, as we have attempted to show, this Court will not entertain.

Finally, if the Court shall be of opinion that it has jurisdiction of the cause, and that complainant is entitled to recover anything, she is not entitled to recover interest upon overdue coupons.

United States v. North Carolina, 136 U. S., 211.

We respectfully submit that the action should be dismissed.

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GEORGE ROUNTREE,
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No. 9—ORIGINAL.

IN THE

SUPREME COURT OF THE UNITED STATES.

IN EQUITY.

THE STATE OF SOUTH DAKOTA, COMPLAINANT,

vs.

THE STATE OF NORTH CAROLINA, CHARLES SALTER AND SIMON ROTHSCHILDS, DEFENDANTS.

NOTES TO GENERAL AND SUPPLEMENTAL BRIEFS SUBMITTED BY NORTH CAROLINA ON THE REARGUMENT.

Fraud on the Jurisdiction.

The testimony upon this point is discussed in the supplemental brief, beginning at page 29 and ending at page 49. See also pp. 55-62, inclusive, general brief.

In view of this testimony there really cannot be a doubt as to the purpose of these assignors in making the voluntary assignment of the ten bonds sued upon to the complainant State. Neither in the brief of the complainant, nor in the argument of its counsel, nor the counsel of its allies (the defendants, Salter and Rothschilds), submitted at the former hearing, is there the slightest attempt made of a denial of the transparent purpose of procuring a suit to be brought by the complainant State in order

that the holders of the remaining second mortgage bonds (owned or controlled by the donors, the Schaffers) might be drawn, as necessary parties defendant, within the jurisdiction of this Court, and thus participate in the proceeds of a foreclosure sale of the stock. The Court is earnestly requested to scrutinize the testimony with a view of determining whether *every contention* of fact in the parts of the two briefs of the defendant State, above referred to, is not *either admitted or sustained by absolutely uncontradicted testimony.* Realizing this, the counsel of the complainant and its allies, the co-defendants, do not pretend, as we have said, to deny the inevitable conclusion that must follow as to the scheme concocted whereby the Eleventh Amendment is to be evaded. The audacity of this attempt to evade a great and vital constitutional principle is well illustrated by the letter of Schaffer accompanying the gift (in which the holders are spoken of as persons who give liberally "to the needy and unfortunate," p. 39, supplemental brief) and the answer of Salter, dictated by the said Schaffer (who, Salter says, employed counsel and is "managing this whole business," p. 32, supplemental brief), in which the prayer is made that this suit shall be *dismissed* unless the Court shall decree that *all* the second mortgage stock shall be sold and proceeds applied to *all* of the holders of the said stock. Page 41, supplemental brief.

The complainant and its allies simply contend that the motive is immaterial and that the case is governed by decisions of this Court, such as *McDonald vs. Smalley,* 1 Peters, 620; *Barney vs. Baltimore,* 6 Wall., 280, and the like. We insist that cases of this character are not at all in point, as they are based upon the

law and statutes governing transfers as affecting the jurisdiction of the several Circuit Courts of the Union. Furthermore, *they relate entirely to claims which might have been sued upon by the assignor,* whereas in the present case the claim of complainant could not have been sued upon by the assignors in any judicial tribunal whatever. It was without remedy when it was assigned, and falls within that class of cases like *United States vs. Buford,* 3 Peters, 12 (see original brief, p. 36), in which it was held that an assignment to a sovereignty like the United States or a State could not confer or revive a remedy which had ceased to exist under the State law. In the present case no remedy ever existed.

The law governing this case is higher and broader than decisions based upon statutes relating to the jurisdiction of Circuit Courts. The principles to be applied grow out of great and fundamental provisions of the Constitution, which this Court will see are not contravened or evaded. Nothing of a narrow, technical character will dim its vision in the discharge of this grave duty.

Cases, then, of the character mentioned can only be used by way of analogy; *but, tested by these cases alone, we confidently contend that this suit cannot be maintained by the complainant.* The cases above mentioned and similar ones have been virtually overruled in so far as they declare that a valid legal transfer of a claim precludes any inquiry into the motive of the transfer. They are reviewed in *Lehigh M. & M. Co. vs. Kelly,* 160 U. S., 349. The majority holding, says Rose's Notes (6 Vol., p.

291-2), that "jurisdiction is defeated where motive was fraudulent." If this were not so, it would be difficult to account for decisions in Kelly's case, just cited; *Little vs. Giles,* 118 U. S., 596; *Farmington vs. Pillsbury,* 114 U. S., 138, and several other cases in which the legal title had passed to the assignee, and for aught that appears was to remain in him, he only agreeing to pay to assignor one-fourth of the recovery in one case and one-half in the other. The Court broke away from the strict technical ground taken in *McDonald vs. Smalley* and similar cases and took a broader view in order to shut down the gates and keep back the flood of fraudulent devices and contrivances by which frauds were attempted upon the jurisdiction.

And so, when it can be seen that where parties are collusively joined or arranged, or assignments are made for the purpose of "creating a case" for removal or jurisdiction, the Court will look into all the circumstances, including the *motive,* and see whether there is an attempted fraud upon the jurisdiction. On the other hand, it is contended that, notwithstanding these rulings, the Court still adheres to the rule as laid down in the Barney and Smalley cases, *supra.* The rule, however, has been more recently stated by Chief Justice Fuller in delivering the opinion of the Court in *Oneal vs. Crawford,* 144 U. S., 585.

> "But if the transfers were absolute and the judgment creditors *parted with all their interest for good consideration,* then the mere fact that one of the motives of the purchase may have been to enable the purchaser to bring suit in the United States Court would not be sufficient to defeat the jurisdiction."

(The italics are ours, though in Kelly's case, *supra,* and many others the Court very frequently italicizes "valuable consideration" in discussing this subject.)

Granting that this last mentioned rule is still in unqualified existence, it in nowise conflicts with the contention we are making. *Indeed, it fully sustains our position,* because in our case the assignors have not *"parted with all their interest,"* nor was there any *"good consideration."* The rule as stated by the Chief Justice is fully sustained by the cases cited in the opinion and others to which we will refer. It is to be noted that the citation of authorities upon this point by the Court includes the cases of *McDonald vs. Smalley, supra; Barney vs. Baltimore, supra; Williams vs. Nottawa,* 104 U. S., 209, which are cited and relied upon in the complainant's brief. It is therefore very clear that the qualifying words we have italicized were by no means considered inconsistent with these cases, and if inconsistent must be considered to that extent modified or overruled.

It is also to be noted that in these cases the entire interest was really or apparently assigned, leaving nothing in the assignor *which could possibly benefit him.* The simplicity of those days seemed unequal to the task of inventing an ingenious scheme like the present, by which the assignor could, by assignment of a part of his claims, obtain a footing in Court for the enforcement of the remainder, which remainder could not otherwise have been sued upon in any court.

As an illustration of the general principle as declared in *Crawford vs. Oneal,* we refer to *Little vs. Giles, supra,* in which it is said:

"Of course, where the interest of the nominal party is real, the fact that others are interested who are not necessary parties, and are not made parties, will not affect the jurisdiction of the Court; but when it is simulated and collusive and created for the very purpose of giving jurisdiction, the courts should not hesitate to apply the wholesome provisions of the law."

These words are directly applicable to our case. They furnish a key to the true solution of questions of this kind. It is thus declared that the motive is only immaterial where the transaction is real and the transfer *does not* affect the jurisdictional relation of others who are interested and are necessary parties. In our case the holders of the remaining second mortgage bonds, as well as the holders of the first mortgage bonds, *are necessary parties and have been made parties by the complainant,* and this relation with the complainant was created by the assignor, Schaffer (who, together with his firm, owned or controlled substantially all of the remaining second mortgage bonds), "for the very purpose of giving jurisdiction, so that in the guise of necessary party defendants they could, as substantial plaintiffs, obtain jurisdiction against a State.

The case of *Ramsey vs. Gould,* 57 Barb., 398, cited in complainant's brief, if applicable to this case at all, is clearly authority for us. The plaintiff was a creditor or stockholder. He had a right to relief although his motives in purchasing and suing was to gratify his malice by calling the officers to account.

The Court said:

"The relative rights of the parties are the same as if the suit were brought by the plaintiff's vendor. The intent with which he purchased does not change or

> *affect those rights or raise any equities respecting them in favor of the defendants.* * * * I do not see that the equity rule has any application here. That has reference to the relation of the parties in respect to the matter in controversy. If there is any abuse of that relation by the plaintiff he does not come with clean hands to enforce an advantage just obtained."

While this and other New York cases have nothing to do with questions of Federal jurisdiction, we have extracted the above as in line with the principle laid down in Giles' case.

The other New York cases cited in complainant's brief are also inapplicable. The fact that the plaintiff in *Rice vs. Rockfelder,* 134, N. Y., 185, was a competitor in the business did not prevent him from purchasing the stock. So, exercising a *legal* right to dig a ditch (as in *Phelps vs. Newlin,* 72 N. Y., 39) is not actionable when it violates no *legal* rights of another, although the motives are bad.

An examination will disclose that the above cases are a fair type of the New York decisions cited by complainant on the question of motive.

The principles we are contending for are sustained in *Farmington vs. Pillsbury,* 114 U. S., 138, in which Giles' case is approved, and in *Lake County vs. Dudley,* 173 U. S., 253, in which these cases are fully approved.

The following extract from the Farmington case well illustrates the spirit in which the Court administers the rule:

> "This suit, begun July 1, 1880, in the name of the plaintiff, is the result of that arrangement. It is a suit for the benefit of the owners of the bonds. They are to receive from the plaintiff one-half of the net pro-

ceeds of the case they have created by their transfer of the coupons for that purpose. The suit is their own in reality, though they have agreed that the plaintiff may retain one-half of what he collects for the use of his name and his trouble in collecting. *It is true the transaction is called a purchase in the papers that were executed,* and that the plaintiff gave his note for $500, but the time for payment was put off for two years, when it was, no doubt, supposed the result of the suit would be known. *No money was paid,* and as the note was not negotiable, it is clear the parties intended to keep the control of the whole matter in their own hands. So that if the plaintiff failed to recover he could be released from his promise to pay. In the language of Mr. Justice Field, speaking for the Court, in *Detroit vs. Dean,* 106 U. S., 537, applied to the facts of this case, the transfer of the coupons was *a mere contrivance, a pretense,* the result of a collusive arrangement to create in favor of this plaintiff a fictitious ground of Federal jurisdiction, so as to get a re-examination in that jurisdiction of the question decided adversely to the owners of the coupons by the highest judicial tribunal of the State.

Hawes vs. Oakland, 104 U. S., 450.
Hayden vs. Manning, 106 U. S., 586.
Bernard vs. Stebbins, 109 U. S., 341."

The principles deducible from the decisions of this Court forbid the assignment of a legal title as a part of a scheme, "contrivance" or "device" whereby the assignors can substantially sue a State, especially where the assignee pays no consideration, and, besides, must from the testimony, have had knowledge of the motive and lent itself as an instrumentality in the carrying out of such unlawful contrivance.

They forbid that an assignment shall be made in such manner *as to affect the jurisdictional relations of the assignors,* so as to enable them to acquire a standing in court as substantial plaintiffs and thus evade the provisions of the Eleventh Amendment.

They forbid that the assignors should *create* a kind of tenancy in common in the security, so that the new tenant, alone being able to sue, can draw into the jurisdiction the claims of the assignors upon which they cannot sue.

They forbid any such manipulation of these few bonds, and the Court will, we trust, look into the whole matter and the unlawful purpose to be accomplished by the assignment.

They forbid any such manipulation of these few bonds, and the Court will, we trust, look into the whole matter and the unlawful purpose to be accomplished by the assignment.

"No doubt if from any source the Court is led to suspect that its jurisdiction has been imposed upon by the collusion of the parties or in any other way, it may at once, of its own motion, inquire," etc.

Hartzog vs. Memory, 116 U. S., 588.
Cross vs. Allen, 141 U. S., 532.

A notable instance of a court declaring that the law is not to be evaded by apparently legal arrangement is

United States vs. Northern Securities Co., 120 Fed., 721.

These principles require that the motives must be looked into under the facts of this case.

It would seem quite clear that these bondholders have no mortgage as contemplated by the statute. No deed was made

as required by the law, and so far from any particular ten shares of stock being described, no certificates of stock were even issued. The holders, therefore, have, at most, an agreement to make a mortgage, or an equitable lien, and to the extent of ten shares each out of this mass of stock. In other words, if they have any lien of any kind, which we deny, it is *in solido.* See general brief, pp. 71-74, and authorities. See also Cook on Corporations, 469.

The distinguished counsel for complainant, in his oral argument, seeing that there was no mortgage as required by law, argued strenuously that the holders were tenants in common, or the like, in all of this class of stock. The other holders, therefore, are necessary parties on *this* as well as on the other grounds mentioned in general brief (49), which grounds are in themselves conclusive. Being in the nature of tenants in common in this stock (or "*quasi* tenants in common." Short's Railway Bonds and Mortgages, p. 46), with the complainant, it is manifest that the assignment is not clear and absolute. It is manifest that the assignors still have an interest in the common security, and it extends to *every part of this* mass of stock.

> "Where an assignment is not absolute, and the assignor retains an interest in the security, he is a necessary party, because he is interested, and particularly in taking an account of what is due on it."
>
> *Miller vs. Henderson,* 2 Stockton (N. J.), 320.

Can it be said that the assignors have reserved no interest *when by reason of this very interest they are necessary parties?*

Can it really be that by reason of the very interest they still have in this common security, they are to be permitted to enforce the collection of their bonds as substantial plaintiffs, and at the same time *it is to be declared that they made a clean, absolute conveyance to complainant, reserving no interest or benefit to themselves?*

If such a scheme as this can succeed, it would be difficult to conceive of a proper definition of a "device" or "contrivance" by which parties are collusively joined and arranged, or assignments made for the purpose of perpetrating frauds upon the jurisdiction.

This case as presented in the record, therefore, offends two rules where the motive is for the purpose of creating a case of jurisdiction:

First. That the assignment did not take out of the assignor his title as tenant in common in the common security.

Second. That the assignors are not only upon this but upon other grounds necessary parties, *and the jurisdictional relation is sought to be changed by the voluntary assignment.*

This, then, being a case in which the motive of the assignment may be inquired into, and the admissions and uncontradicted testimony plainly showing that this voluntary assignment was a part of a scheme or contrivance to evade a great constitutional provision, and that the assignment was made for such fraudulent purpose, we submit that upon this ground alone the complainants' bill should be dismissed.

Note to page 49.

General Brief as to Doctrine of Cal. vs. So. Pacific Co.

By reference to the above page of the general brief the Court will see that the second mortgage bondholders are necessary parties upon other grounds than those discussed in the preceding note. We respectfully ask that these last-mentioned grounds be also considered on the subject in connection with those mentioned on said page 49.

Note to page 48, original brief.

Re-arrangement of Parties.

"A Federal Court is without jurisdiction of a suit for specific performance of a contract in which the complainant owns only a part interest, where the owner of the remaining interest, who is joined as a defendant, is a citizen of the same State as his co-defendants, the other parties to the contract. In such case he must be arranged by the Court on the side of the complainant in the controversy."

Joseph Dry Goods Co. vs. Hecht, 120 Fed., 761.

"A Federal Court is without jurisdiction of a suit by a legatee under a will against the executor and other legatees who are citizens of the same State, where it appears from the bill that the interests of such other legatees in the matter in controversy are identical with those of plaintiff, and they are made defendants only on an allegation that they refuse to join as plaintiffs."

Johnson vs. Ford, 109 Fed., 501.

Note to page 36 et seq., general brief.

Assignee cannot acquire greater rights than assignor.

Green vs. Early, 39 Md., 223: "Where an assignee takes an assignment with knowledge that his assignor bore a particular relation to the party from whom he acquired his title to the subject-matter assigned, if the title should be impeached by reason of such relation the assignee is required to defend the assignment as if he himself stood in such relation."

Hill vs. McPherson, 15 Mo., 147: "If a firm executes a note to one of its members he cannot sue on it at law, nor can his assignee. The assignment cannot create a right to sue when the assignor has not such right."

"We cannot see how the assignor, who could not sue himself, can give by his assignment power to the assignee to sue."

Security Trust Co. vs. Black River Nat. Bank, 187 U. S., 211. Where claim against administrator is barred by State law a suit in Federal Court by non-resident will not be sustained.

Cites *Yondley vs. Lavender,* 21 Wall., 276.

After stating that the several States have full control over estates of deceased persons and their laws will be followed, the Court says:

"Besides this, it would give to the contract of a foreign creditor made in Arkansas a wider scope than a similar contract made in the same State by the same debtor with a home creditor. * * * Such a difference is manifestly unjust and cannot be supported."

In Lavender's case, in citing *Payne vs. Hook,* 7 Wall., 429, the Court, in granting relief in equity, said:

"No greater rights in the estate were adjudged to her than were secured by the law of the State."

In *Hawn vs. Trainer*, 109 Pa. St., 1, it was held that a wife could not, after maturity, assign a note payable to her by her husband so as to enable the assignee to sue upon it. The affidavit for defense also sets up the defense that the assignment was not for value, but a mere device. The Court said:

"If the latter point is made the jury should be required to find specially and separately upon it, because there would then arise another question, whether during marriage and cohabitation a wife can transfer, even for value, a note of her husband as to which her own right of action was suspended by the marriage, so as to enable the indorsee to sue her husband. If so, she can at will nullify that provision of the statute (that is, a wife may not sue a husband except in case of divorce, etc.). This is an important general question which was suggested but not argued in the case, and therefore we express no opinion upon it."

Following the line of Hawn's case:

See *Bullard vs. Kenney*, 10 Cal., 63, where assignee of a partner's claim against partnership could not recover, such remedy not contemplated by parties to the transaction.

See *Brooks vs. Record*, 47 Ill., 30, where it is said the assignee can take no higher or better title than the assignor. In this case the assignor had lost his remedy by *laches*.

"The laws which exist at the time and place of the making of the contract and where it is to be performed enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge and enforcement."

Walker vs. Whitehead, 16 Wall., 314.

"It is also settled doctrine of this Court that the laws which subsist at the time and place of making a contract enter into and form part of it, as if they were expressly referred to or incorporated in its terms."

Edwards vs. Kearsey, 96 U. S., 601.

Let the doctrine declared by Hamilton and others and approved by this Court in *Haus vs. Louisiana*, 134 U. S., 1; *Arkansas vs. Washington*, 21 How., 530, and many other cases—that "those who deal in the bonds and obligations of a sovereign State * * * must rely altogether on the sense of justice and good faith of the State"—be read into these bonds, and it must follow that an assignment to another State cannot in this way deprive the debtor State of such a vital element of sovereignty.

See also *Smith vs. Reeves*, 178 U. S., 446.

States are political bodies, and it was not contemplated that they should deal in the bonds of a sister State. Taking these bonds under the circumstances, it can hardly be said that the claimant acquired them in "due course."

Furthermore, so far as the transfer is tainted with a fraudulent purpose to evade the Eleventh Amendment, the claimant cannot in any view invoke the ordinary rule of commercial law as to the good faith of an antecedent holder. *The fraud here was not perpetrated or attempted to be perpetrated by an antecedent holder, but between the immediate assignors* and the complainant assignee. The testimony shows that she must have

known of this fraudulent purpose. Even if she did not, she is a volunteer and is affected with knowledge of it.

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IN EQUITY.

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[redacted]

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No. 9—ORIGINAL.

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THE STATE OF SOUTH DAKOTA, COMPLAINANT,

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THE STATE OF NORTH CAROLINA, CHARLES SALTER AND SIMON ROTHSCHILDS, DEFENDANTS.

ARGUMENT OF GEORGE ROUNTREE, OF COUNSEL FOR DEFENDANT, NORTH CAROLINA.

May it please the Court:

Most of us thought, after the passage of the Eleventh Amendment, and the decisions of this Court in *Louisiana vs. Jumel,* 107 U. S.; *New Hampshire vs. Louisiana,* 108 U. S.; *In re Ayres,* 123 U. S.; *Christian vs. The Atlantic and North Carolina Railroad,* 133 U. S.; *Hans vs. Louisiana,* 134 U. S., and *Smith vs. Reeves,* 178 U. S., 436, expounding and applying that amendment, that the ingenuity of counsel for speculators in the repudiated public securities of a State, often irregularly if not illegally issued, was exhausted, but that was a mistake. We have here another and even bolder attempt to nullify that amendment, for while this suit is in name one between the State of

South Dakota as complainant and the State of North Carolina and others as defendants, it is apparent that it is, in purpose and effect, one by individual holders of bonds, using the name of the State of South Dakota against the defendant, the State of North Carolina.

This proposition and the evidence upon which it rests we will discuss a little later.

We understand the law to be firmly settled that a sovereign State cannot be sued in this or any other court without its consent, and the only question is whether that consent has been given. It has not been expressly given; on the contrary, the State of North Carolina challenges the jurisdiction of this Court and protests against its exercise; and if consent has been given at all it must be because the suit is embraced in the grant of judicial power to this Court by the Constitution.

This we deny; and we contend that:

1st. Such a suit is not within the original grant of judicial power to this Court—is not such a "controversy between two or more States" as was contemplated by the Constitution; and

2d. If it were originally included within the grant it has been withdrawn by the Eleventh Amendment, because the suit is in effect a suit by or on behalf of private individuals against a State.

Complainant argues that this cause comes within the very words of the constitutional grant of judicial power to this Court, and does not need any construction; and, secondly, that even if this clause needed construction, this Court ought to adopt the one "liberal in the extreme to favor such jurisdiction and to

carry out the beneficent purposes by the Constitution sought to be obtained."

In support of these propositions counsel argues that from the beginning there have been two schools of thought with reference to the construction of the Constitution in this respect: one represented by the argument of Mr. Justice Wilson and the other by the argument of Mr. Justice Iredell in Chisholm's case; and they insist that the Court should adopt the argument of Mr. Justice Wilson, because it would be so much more convenient and more beautiful in theory to have all causes of complaint against every one, including sovereign States, to be determined by this tribunal.

But both of these propositions have been in their universality expressly negatived by the decisions of this Court. There are many cases, some of them cited in the brief, the latest of which is *Smith vs. Reeves,* 178 U. S., 436, which expressly hold that the mere fact that a controversy is included within the language of the grant of judicial power is not conclusive of the question of jurisdiction; and this Court has already, as it seems to us, definitively adopted the line of thought advocated by Mr. Justice Iredell. So that neither of the contentions of the complainant settle the controversy, unless, indeed, they settle it by implication in favor of the State of North Carolina.

See *Hans vs. Louisiana,* 134 U. S., 1.
Smith vs. Reeves, 178 U. S., 436.
Miller's Lectures on the Constitution, p. 382.

The clause of the Constitution conferring original jurisdiction upon this Court to hear and determine "controversies be-

tween two or more States" has received much consideration within the last few years, but the Court has uniformly refused to give an authoritive definition of the word "controversies," and has decided each case upon its own merits—upon a consideration of whether it did or did not come within the true meaning and spirit of the Constitution; and while the cases have been too few to enable us to formulate a rule for the solution of each case as it arises, we do know that the court proceeds with the utmost caution in all suits against the States, and that it is not alone sufficient for him who asserts such jurisdiction to appeal to the letter of the Constitution. "We must look," as Mr. Justice Shiras said, in *Missouri vs. Illinois*, "*not merely to its language, but to its historical origin, and to those decisions of this Court in which its meaning and the scope of its operations have received deliberate consideration.*"

The genesis of the clause is said to be found in the experience of the colonies and of the States under the Articles of Confederation.

At an early period in our history sharp disputes arose between the colonies as to boundaries and other questions, one of which, relating to boundary—that between Pennsylvania and Maryland—was decided by Lord Hardwicke in the Court of Chancery; and so when the Articles of Confederation came to be agreed to they contained a clause conferring jurisdiction upon Congress to decide disputes "between two or more States concerning boundary, jurisdiction or any other clause whatever."

Notwithstanding the comprehensiveness of this grant and the fact that bitter disputes arose between some of the States, grow-

ing out of injuries inflicted upon the citizens of some by the discriminating and hostile commercial and monetary laws of others—Connecticut, in retaliation, going so far as to pass laws forbidding her courts to try cases of Rhode Island creditors against Connecticut debtors (Ford's note to 7th No. of the Federalist)—not a single controversy of such a nature was submitted, while one arising directly between the States out of conflicting claims of boundary had been determined and several others were pending at the time of the adoption of the Constitution!

When the delegates met in convention to form the Constitution, in the effort to "insure domestic tranquillity," they took great pains to prevent disputes arising between the States by depriving them of all power to discriminate against the citizens of other States and by forbidding them to make compacts and agreements without the consent of Congress; but no method was discovered of dealing with controversies, either present or future, growing out of trespasses by one State upon the rights of another, other than the old method of submitting them to an impartial judicial tribunal.

And while it is settled that the word "controversies" is not to be restricted to disputes concerning boundary and jurisdiction, we respectfully insist that it ought to be confined to cases of the same general kind—to those which arise immediately between the contending States—to those in which, granting plenary jurisdiction in the courts for individual and State alike, adequate redress could only be had by the action of the State; and it ought not to be expanded to include disputes which arise between individuals and States, and which are assigned, conditionally or

absolutely, by such individuals to another State for the purposes of suit.

This we would naturally infer to be its meaning from the origin and history of the clause, and that inference is strengthened by the decisions of this Court, in which it has been considered.

In *United States vs. Texas*, 143 U. S., 621, speaking of this clause, Mr. Justice Harlan says, on page 639:

> "At the time of the adoption of the Constitution, there existed, as this Court said, in *Rhode Island vs. Massachusetts*, 12 Peters, 657, 723, 724, controversies between eleven States, in respect to boundaries, which had continued from the first settlement of the colonies. The necessity for the creation of some tribunal for the settlement of these and like controversies that might arise, under the new government to be formed, must, therefore, have been perceived by the framers of the Constitution, and, consequently, among the controversies to which the judicial power of the United States was extended by the Constitution, we find those between two or more States."

Accordingly we find that this Court has entertained jurisdiction of several controversies between States growing out of conflicting claims of soil, territory, jurisdiction and boundary, and of none other, except in the recent cases of *Missouri vs. Illinois*, 180 U. S., 208, and *Kansas vs. Colorado*, 185 U. S., 125.

In each of these cases the controversy arose immediately and directly between the contending States, and grew out of State action deemed by the complainant in each case to be injurious not only to her citizens but to her sovereign rights, and which,

if done by an individual, could only be adequately redressed by an action on behalf of the public—the State.

On the other hand, in *New Hampshire vs. Louisiana,* 108 U. S., 76, this Court held that it had no jurisdiction of a controversy arising between the State of Louisiana and the holders of her repudiated bonds, and which bonds and controversy had been assigned to the State of New Hampshire by the individual holders for suit.

It is true that the Court emphasized the fact that the bonds were assigned merely for the purpose of collection, and the complainant was not the beneficial owner thereof, even though she had full right to receipt and acquit the debtor, but it by no means follows that the decision would have been the other way if New Hampshire had been the actual owner of the bonds. Indeed, the Chief Justice says, towards the end of his opinion:

> "One State cannot *create a controversy with another State,* within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other States to its citizens."

And these decisions seem to have been supposed by Mr. Justice Miller to vindicate the opinion of Hamilton, that a justiciable controversy against a State could not be created by the assignment of the debts of a State.

In *Cunningham vs. Macon and Brunswick R. R. Co.,* 109 U. S., 446, referring to those cases, he said, on page 450:

> "These latter suits (*New York* and *New Hampshire vs. Louisiana*) were based on the proposition that the constitutional provision that States might

> sue each other in this Court would enable a State whose citizens were owners of obligations of another State to take a transfer of those obligations to herself and sue the defaulting State in the Court. The doctrine was overruled in those cases at the last term by the unanimous opinion of the Court."

See also his comment on these cases in his lectures, page 382.

And here we desire to call the attention of the Court to the fact that the case of *New Hampshire vs. Louisiana,* 108 U. S., 76, expressly negatives the opinion expressed by Judge Curtis in the *North American Review* for January, 1844, and by General B. T. Johnston in 12 American Law Review, relied upon by counsel for complainant, that citizens of a foreign State could assign their bonds, or other debts, against one of the States of this Union, to a foreign State, and that that State might collect such debts by an action in this Court. In their opinion it apparently made no difference whether the complainant State was beneficial owner, or trustee with power of acquittance.

This Court has more than once said that its original jurisdiction was limited, and strongly implied that it was not to be extended by construction. (Miller, J., in *Cunningham vs. M. & B. R. R. Co.,* 109 U. S., 446, 451. Fuller, C. J., in *Cal. vs. So. Pac. Co.,* 157 U. S., 229, 257, and in *Louisiana vs. Texas,* 176 U. S., 1, 15), and in *Louisiana vs. Texas, supra,* it was distinctly held that this Court had jurisdiction *only* of those controversies which arise directly between the contending States, and that a suit cannot be brought by a State merely to redress the wrongs of its citizens.

If the term "controversies" is to be confined to those cases in which the controversy arises immediately and directly between the contending States and growing out of their public relations and intercourse, as we think it ought to be, that is an end of this case, because the pleadings and proofs show that it not only did not arise directly between the States of South Dakota and North Carolina, but the controversy arose between individuals, the Schafers—holders of those so-called second mortgage bonds—and the State of North Carolina and the State of South Dakota became interested in it as transferee *pro tanto*, and as the result of elaborate machination and contrivance.

Many reasons may be urged in support of the proposition that this suit does not fall within the meaning of the term "controversies," as contained in the clause of the Constitution conferring original jurisdiction upon this Court. It is settled by numerous decisions that ALL controversies are not included, and, although Mr. Justice Bradley in *Hans vs. La.*, 134 U. S., 1, 15, said some things were made justiciable by the Constitution which were not known as such under the common law, he refers, by way of illustration, only to such things as boundaries, which had been the subject of judicial settlement by Congress under THE ARTICLES OF CONFEDERATION, and adds:

> "OF OTHER CONTROVERSIES BETWEEN A STATE AND ANOTHER STATE, or its citizens, which on the settled principles of public law are not subjects of judicial cognizance, this Court has often declined to take jurisdiction."

Again, in the same case, he says:

> "The truth is, that the cognizance of suits and actions UNKNOWN TO THE LAW AND FORBIDDEN BY THE LAW, was not contemplated by the Constitution when establishing the judicial power of the United States."

He then proceeds to show, by quotations from the writings and speeches of Hamilton, Madison and Marshall, advocating the adoption of the Constitution, and replying to the arguments of Patrick Henry, George Mason and Richard Henry Lee, that States were not suable at all without their consent, and that the Constitution did not authorize suits *against them upon their debts,* and quotes with approval this extract from the opinion of Mr. Justice McLean, delivering the opinion of the Court in *Bristow vs. Bank of Kentucky,* 11 Peters, 257, 321:

"What means of enforcing payment from the State had the holder of a bill of credit? * * * No sovereign State is liable to be sued without her consent.—UNDER THE ARTICLES OF CONFEDERATION, a State COULD BE SUED ONLY IN CASES OF BOUNDARY. It is believed that there is no case where a suit has been brought, at any time, on bills of credit against a State; and it is certain that no suit could have been maintained on this ground prior to the Constitution."

This, by the way, notwithstanding the fact that by the Eleventh of the Articles of Confederation jurisdiction was conferred upon Congress to hear and determine all disputes and differences "BETWEEN TWO OR MORE STATES CONCERNING BOUNDARY, JURISDICTION OR ANY OTHER CAUSE WHATEVER."

And we have been able to find no case in which this Court has

entertained jurisdiction in a *suit on a debt* against a State *without the express consent of that State,* save in Chisholm's case, and that case was expressly disapproved by Mr. Justice Bradley in *Hans vs. Louisiana,* who expressed the opinion of all the members of the Court, except that of Mr. Justice Harlan, that the views of Mr. Justice Iredell in Chisholm's case were clearly correct.

We do not include the case of *U. S. v. N. C.,* 136 U. S., 211, because that was a clear case of CONSENT EXPRESSLY GIVEN; and the Court always has jurisdiction in such cases. *Clark vs. Barnard,* 108 U. S., 476; *Minnesota vs. Hitchcock,* 185 U. S., 373, 386.

To return. Mr. Justice Iredell, following Hamilton, Madison and Marshall, but without quoting them, had earnestly insisted that no action would lie against a State to collect a debt.

And Hamilton, in his report to Congress, 1785, said:

> "Public debt can scarcely, in legal phrase, be defined either as property in possession or in action. It is evidently not the first till it is reduced to possession by payment. To be the second, would suppose a legal owner to compel payment by suit. Does such a power exist? The true definition is, a property subsisting in the faith of the government. Its essence is promise. Its definite value depends upon the reliance that the promise will be definitely fulfilled."

Chief Justice Taney in *Bank of Washington vs. Ark.,* 20 Howard, uses this language:

> "Those who deal in the bonds and obligations of a sovereign State are aware that they must rely altogether on the sense of justice and good faith of the

> State; and that the judiciary of the State cannot interfere to enforce these contracts without the consent of the State, and the Courts of the United States are expressly prohibited from exercising such jurisdiction."

And Mr. Webster, in an opinion given to Baring Brothers and quoted with approval by Mr. Justice Bradley, in Hans' case, said:

> "The security for State loans is the plighted faith of the State as a political community. It rests on the same basis as other contracts with established governments, the same basis, for example, as loans made by the United States under the authority of Congress, that is to say, the good faith of the government making the loan, and its ability to fulfill its engagements."

These expressions ought to be sufficient evidence that in the opinion of many of our leading judges and statesmen, State debts were not intended to be made collectible by law.

Another argument against such suits urged by Hamilton with much force and cogency in the 81st No. of the Federalist, and by others, is that the Court will not take jurisdiction of suits against States for debts, because, in the great majority of such cases, the Court would have no process by which it could enforce the decree. Indeed, the only conceivable way would be for the Court to supercede the officers of State having control of its fiscal affairs, and appoint a receiver to manage the State's business.

This the Court is not prepared to do (*Giles vs. Harris,* 189 U. S., 475), as it seems to have put the stamp of its approval upon Hamilton's argument. For in *U. S. vs. Guthrie,* 17 How., 284, Mr. Goodrich was appointed Judge, and, before the expira-

tion of his term, he was removed and Mr. Fuller was appointed in his stead and received the salary, brought mandamus against the Secretary of the Treasury to compel its payment. Upon writ of error this Court said:

> "The only legitimate inquiry for our determination upon the case before us is this: Whether, under the organization of the Federal government, or by any known principle of law, there can be asserted a power in the Circuit Court of the United States for the District of Columbia, or in this Court, to command the withdrawal of a sum or sums of money from the treasury of the United States, to be applied in satisfaction of disputed or controverted claims against the United States? This is the question, the very question presented for our determination; and its simple statement would seem to carry with it the most startling consideration; nay, its unavoidable negation, unless this should be prevented by some positive and controlling command; for it would occur, *a priori*, to every mind, that a treasury, not fenced round or shielded by fixed and established modes and rules of administration, but which could be subjected to any number or description of demands, asserted and sustained through the undefined and undefinable discretion of the Courts, would constitute a feeble and inadequate provision for the great and inevitable necessities of the nation. The government under such a regime, or rather under such an absence of all rule, would, if practicable at all, be administered not by the great departments ordained by the Constitution and laws, and guided by the modes therein prescribed, but by the uncertain and perhaps contradictory action of the Courts, in the enforcement of their views of private interests."

Of course the argument is equally valid against interference with the State Treasury; indeed the Constitution of North Carolina expressly forbids the taking of money from the treasury except by legislative warrant.

If it be said that this argument does not apply to the present case because property has been mortgaged which can be seized by the Court, sold and the proceeds applied to the payment of the debt, it is sufficient to say that as we have attempted to show in the brief, no particular property has ever been designated, identified or set apart, as covered by the mortgage, and complainant has, if anything, only an action for debt, and the argument just made is valid.

Nor do we think that it can be shown that such a jurisdiction, however convenient, is of any great value or necessity. The fact that all civilized nations, including the States of this Union, have been large borrowers at various times, and have been compelled to issue public securities to raise money, and that there has been no practical difficulty in so doing, growing out of the settled principle of law of almost if not quite universal acceptance, that, in the language of Chief Justice Taney, "those who deal in the bonds and obligations of a sovereign State are aware that they must rely altogether on the sense of justice and good faith of the State," has not seriously impaired the power to borrow, would seem to be conclusive of the lack of necessity for this jurisdiction. And the fact that it has not been expressly given, apparently, in any country, would seem to show grave apprehension of danger from its exercise. See Lord Halsbury's speech in the "Scotia" (1903), A. C., 501, 506.

But if this Court has jurisdiction to entertain suits against States to collect debts at all, we contend that it ought to be confined to cases in which the debt was due by one State to another upon contracts, transactions, dealings directly between the States—to cases in which the States understand at the time of entering into the transaction that it was enforcible by law—and should not be extended to cases where the obligations were due to private individuals, and which they, being unable to collect, assigned to another State for collection, even though the collecting State was to be the beneficial owner of the proceeds.

In the first place it was evidently the opinion of Hamilton that the Constitution did not authorize, or permit, suits to be brought against States on their debts as the result of assignments; for, although he only refers to suits as the result of assignments to citizens of other States, the purpose of his argument was to show that in no event need the State fear that they would be compelled to pay their debts by suit in the Federal Courts. Apparently, it never occurred to him, nor, so far as we could learn, to any of the other advocates of the Constitution—nor to its opponents—that the real danger to the State of being compelled to pay their debts by the process of the Courts lurked in the generality of the clause conferring jurisdiction upon this Court of "controversies between two or more States." It probably was not apprehended by the people when the Eleventh Amendment was adopted; it had not occurred to Chief Justice Marshall when he delivered the opinion in *Cohens vs. Virginia,* and the first intimation of it that we have been

able to find is contained in a note by Kent to his Commentaries, who speaks of it but to doubt it.

In the next place:

To permit these bonds to become actionable by assignment is to hold that the burden of an obligation can be increased by assignment beyond what was intended to be assumed by the obligor, for it is certain that the State did not intend, nor did those who took them understand, that there should be other sanction for their collection than the plighted faith of the State.

In *Tolehurst vs. Cement Manufacturers* (1901), 2 K. B., 811, Mr. Justice Matthew said:

> "Whenever by reason of change of business or change of parties the result of an assignment would be to impose upon one of the contracting parties a greater liability than he ever intended to assume, the contract cannot be assigned."

The case has been reversed by the House of Lords, but this principle was expressly approved.

Lord Lindlay's Speech (1903), A. C., 423.

It cannot be said that the "burden of the obligation" is not increased, but only a remedy given, because, both practically and legally, the remedy is a very essential part of the obligation. If to take away the remedy is to impair the obligation, why should not giving a remedy where none existed be an increase, more properly a creation of the obligation?

That conferring the quality of suability upon obligations not originally suable is an increase of the burden is sustained by

the authority of Chief Justice Jay, who, towards the end of his opinion in Chisholm's case, said:

> "That such suability may, nevertheless, not extend to all demands, and to every kind of action there may be exceptions. For instance, I am far from being prepared to say that an individual may sue a State on bills of credit issued before the Constitution was established, and which were issued and received on the faith of the State and at a time when no idea or expectation of judicial interposition were entertained or contemplated."

This fits our case.

Again, it seems to be settled that when the sovereign comes into court voluntarily and invokes its aid, it waives its exemption and submits to the application of the same principles by which justice is administered between individuals.

The only exceptions to this rule are laches and the statute of limitations. Notwithstanding the fact that the government, either State or National, is not barred by the statute of limitations, this Court held in *U. S. vs. Buford,* 3 Peters, 12, that a claim barred by the statute of limitations, in the hands of the assignor, and afterwards assigned to the United States, could not be sued on; and the Court stated the law to be that "the assignment of a claim to the government gives it no greater validity than it possessed in the hands of the assignor." To the same effect is

U. S. vs. N. C. & St. L. R. Co., 118 U. S., 125.

These authorities seem to us to be directly in point. A person holding an obligation of another which is barred by the

statute of limitations has a valid moral claim against the person whose obligation he holds, but it is an imperfect obligation, that is, there is no remedy for its enforcement; so an individual holding an obligation of a State has perhaps a valid moral claim against the State, but it is one of imperfect obligation, because there is no remedy to enforce it. The two cases seem to be analogous with reference to the remedy, and, if a remedy is not given in the one case by assignment to another State, we can see no reason why it should be given in the other.

Again, we insist that an assignment merely for the purposes of litigation against a State is against public policy and void.

> "At common law the transfer of a mere right to recover in an action at law was forbidden as violating the rule against maintenance and champerty; and, although the rigor of that rule has been relaxed, an assignment of a chose in action will not be sanctioned when it is opposed to any rule of law or public policy."

The judiciary act of 1789 (the work of Elsworth, C. J., an influential member of the Constitutional Convention), and all subsequent ones, prohibits suits by assignees unless the assignor could sue, and while the act applies only to the District and Circuit Courts, and there are exceptions, it manifests a general policy of the law with reference to the effect of assignments as giving jurisdiction, which may furnish an analogy in cases of doubt.

Such an assignment contravenes the policy or spirit of the Eleventh Amendment.

Certainly one of the fundamental purposes of the formation of the Constitution was to insure domestic tranquility, and

jurisdiction of controversies between two or more States was given to the Supreme Court for the purpose of allaying strife—not for the purpose of fomenting quarrels. What surer method of arousing animosities, engendering discord and retaliations can be conceived than by encouraging such suits? Such, at any rate, is the lesson of experience—of the Chisholm case—and assignments for such purpose are, we submit, against the highest consideration of public policy, peace and good will among the States.

Not only that, but the main purpose of the people of the several States in adopting the Eleventh Amendment, according to Chief Justice Marshall in *Cohens vs. Virginia,* was to prevent States from being compelled by the compulsive process of courts to pay debts due to individuals, which neither party regarded as suable when created; and, if a debt, disowned, can be collected by the simple device of assigning it to a State, then indeed the Eleventh Amendment becomes a dead letter—is a ridiculous mouse from the labor of the mountain. *Individuals can compel the payment of their debts by threat of assignment, or, as here, enforce payment by giving a complainant State a substantial commission for collection.*

> "Whatever is done in fraud of law is done in violation of law." *Lee vs. Lee,* 8 Peters, 44, 50.

We, therefore, earnestly insist that to permit suits in this Court by one State against another upon a debt growing out of transactions or contracts entered into immediately between two or more States would produce comparatively little inconvenience to the fiscal affairs of the States or otherwise, but to

permit suits like this to be brought in this Court upon public securities issued by a State to individuals, and upon which neither party, at the time of the inception of the contract, had the least idea that a legal action could be brought, is to produce all the evil results apprehended by the people when they reversed the action of this Court in Chisholm's case by the prompt adoption of the Eleventh Amendment, *and that by indirection.*

THIS PARTICULAR SUIT IS FORBIDDEN BY THE ELEVENTH AMENDMENT.

The bill shows that the effect of a successful prosecution of this suit is to collect mortgage bonds due to the complainant, the State of South Dakota, AND TO THE INDIVIDUAL HOLDERS of all similar bonds; and we think the bill, answer of the representative of the individual bondholders, and proofs, show that the suit is by, or on behalf of, individuals—using the name of the complainant State and PAYING HER A FEE IN BONDS to collect the bonds retained by them. In either event the suit is forbidden by the Eleventh Amendment.

First as to the bill:

Paragraphs III and IV allege the ownership by the State of North Carolina of 30,000 shares of stock in the North Carolina Railroad Company of the par value of $3,000,000, and the execution of a statutory second mortgage upon such an amount of the State's stock as should equal the par of the bonds issued under the act mentioned "for the security of the bonds held by your orator, AND OF ALL OTHER BONDS OF THE SAME ISSUE." Paragraph XII alleges that complainant is entitled to pay off the first mortgage bonds, or for a sale of so many shares thereof as

may be required to pay off and discharge the FIRST AND SECOND MORTGAGES. Paragraph XIII, that the rights of the complainant cannot be fully administered without the presence before the Court of the holders of the second mortgage bonds, "the matters to be herein determined being of interest, general and common, to all of said bondholders," and, as they are very numerous, Charles Salter is made a party as representative of the class, and the prayer of the bill asks that the number and amounts of the first and second mortgage bonds be ascertained, and that a sufficient number of the shares of the State's stock be sold to pay off and discharge all the FIRST AND SECOND MORTGAGE BONDS OUTSTANDING.

Charles Salter, the representative of the individual holders, is not joined as co-complainant, but is made defendant; however, there is no allegation that he declined to join as plaintiff, and his answer and the brief of his counsel show that he is most anxious to join in the relief.

It is manifest that if we are to look at things and not at names, at substance and not at forms, the suit presents a controversy between the holders of all second mortgage bonds, including South Dakota and Charles Salter, representing individual bondholders, as complainants against the State of North Carolina and Simon Rothschild as defendant.

Under the judiciary acts conferring jurisdiction upon the Circuit Courts of the United States "of all suits * * * in which there shall be a controversy between citizens of different States," the Court, in order to ascertain whether it has jurisdiction—whether the CONTROVERSY is between citizens of differ-

ent States—re-arranges the parties according to their real interest in the controversy. So, when the Constitution confers the limited and exceptional jurisdiction upon this Court of "controversies between two or more States," the Court ought to look beyond the forms used by the pleader to the facts in order to ascertain between whom the controversy really exists, and if necessary, re-arrange the parties. It is, however, not necessary to re-arrange the parties in order to show that this suit is by, or for the benefit of, Charles Salter.

In *Blacklock vs. Small,* 127 U. S., 95, Jacob Small, a citizen of the State of South Carolina, executed a bond to Blacklock, for the sum of $10,600, a mortgage to secure same upon certain property in said State.

Blacklock assigned and transferred for value the bond to Alex. Robertson, in trust, for the three children of Blacklock, Emma Jane Blacklock, Mary Blacklock and Helen Robertson Blacklock. Small pretended to pay the bond and mortgage to Robertson in the notes of the Confederate States, and Robertson satisfied the mortgage of record and delivered up the bond to Small.

Two of the children of Blacklock, Emma Jane and Mary, being citizens and residents of the State of Georgia, brought a bill in equity in the Circuit Court of the United States against Small, a citizen of South Carolina, for the purpose of annulling the payment of the bond in Confederate notes, the satisfaction of the mortgage, and for the re-establishment and foreclosure of the said mortgage lien.

Small interposed a plea to the jurisdiction, because the plain-

tiff, as well as himself, were citizens of South Carolina when the bill was filed. The plea was overruled. Small answered, as did also Robertson. The defendant, Helen Robertson Blacklock, put in an answer admitting the allegations of the bill and generally joined with the plaintiffs in the prayer for relief.

This Court decided that the Circuit Court was without jurisdiction, and directed it to dismiss the bill. Mr. Justice Blatchford delivering the opinion of the Court, on page 104 said:

"There is another difficulty in the case, on the question of jurisdiction. The bond was a unit; and the assignment of the bond by Blacklock to Robertson in trust for the children of Blacklock was a unit. The bond cannot be enforced against Small, nor can the mortgaged premises be sold, in favor of the two plaintiffs alone. THE RELIEF ASKED IN THE SUIT MUST NECESSARILY be for the benefit of the defendant, Helen Robertson Blacklock, as well as for the benefit of the plaintiffs, especially as by her answer she arranges herself on the side of the plaintiffs as against Small, joins in the prayer of the bill, and asks that the payment of the bond and the satisfaction of the mortgage be declared void, and that the bond and mortgage be declared valid in the hands of Robertson, as trustee, for the benefit of herself and the plaintiffs, and that Small be decreed to pay to herself and the plaintiffs the amount of money secured by the bond and mortgage, with interest. The suit is, therefore, shown to be one substantially by and for the benefit of Helen Robertson Blacklock, and the proofs show that at the time of the commencement of the suit she was and has since then always

continued to be a citizen of South Carolina, of which State Small was and is a citizen."

There can be no question, then, that according to the allegations of the bill this suit is "by and for the benefit of" individual bondholders—represented by Charles Salter—as well as for the benefit of the State of South Dakota. Can such a suit be sustained?

We think not.

Without taking into account the prohibitions of the Eleventh Amendment it could not be.

This Court has more than once said that its original jurisdiction over "controversies" in which States are parties is limited and not to be expanded by construction.

When a State consented to be sued by another State in a proper controversy it certainly did not thereby expressly consent to be sued by such State AND AN INDIVIDUAL, and to hold that it did requires decidedly expansive construction.

Such is the expressed opinion of Mr. Justice Curtis, who said in *Florida vs. Georgia*, 17 How., 478, on page 504:

"The State of Georgia has consented to be sued by one or more States, or by a foreign State, and by no other person or body politic. The State of Georgia has consented to stand joined as a defendant with one or more States, or with a foreign State, and with citizens or subjects of a State other than the one bringing the suit, but with no other person or body politic. Certainly there is no power existing in this government to enlarge that consent so as to embrace in it anything to which it does not by its terms extend."

And we think the point is expressly ruled *in the refusal by this Court,* in the case of *Cal. vs. S. P. Co.,* 157 U. S., 229, 256, when it refused, on motion made, to permit the city of Oakland to be joined as co-complainant with the State.

Again, under the Judiciary Act of 1875, and probably under that of 1887-1888, the Circuit Court has no jurisdiction unless each person for whose benefit the suit is brought and who will, if it is successful, reap the fruits of the recovery, could maintain the suit against each one of the defendants.

This is established by the Removal Cases, 100 U. S., and Blacklock's case, 127 U. S., 95.

If this rule of law results merely from the fact that the Judiciary Act only confers jurisdiction upon the Circuit Courts of suits in which there is a "controversy" betweeen citizens of different States, surely a similar rule should apply to suits against States when the Constitution confers jurisdiction only when the controversy is between "two or more States," and in addition to that a suit by AN INDIVIDUAL, OR ON BEHALF OF AN INDIVIDUAL, is expressly forbidden by the Eleventh Amendment.

New Hampshire vs. Louisiana, 108 U. S., 72.

The decisions of this Court upon that amendment have certainly not tended to minimize its effects, but to maintain it in letter and in spirit.

In Va. Coupon Cases, 114 U. S., 322, Mr. Justice Bradley, speaking for the Chief Justice, Justice Miller, Gray and himself, said:

"Moreover, the Eleventh Amendment is not intended as a

mere formula of words, to be slurred over by subtle methods of interpretation, so as to give it a literal compliance, without regarding its substantial meaning and purpose. It is a grave and solemn condition, *exacted by sovereign States for the purpose of preserving and vindicating their soverign right to deal with their creditors and others propounding claims against them,* according to their own views of what may be required by public faith and the necessities of the body politic. We have no right, if we were disposed, to fritter away the substance of this solemn stipulation by any neat and skilful manipulation of its words. We are bound to give it its full and substantial meaning and effect."

In the subsequent case of *Hans vs. Louisiana,* delivering the opinion of the Court, the same learned Justice said:

> "The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. Can we suppose that when the Eleventh Amendment was adopted it was understood to be left open for citizens of a State to sue their own State in the Federal Court, whilst the idea of suits by citizens of other States, or foreign States, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States; can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face."

The case of *Smith vs. Reeves,* 178 U. S., 436, was decided upon similar grounds.

This language is applicable to the present case.

When we remember the indignation aroused by the decision in Chisholm's case and the promptitude and unanimity with which it was corrected by the adoption of the Eleventh Amendment, we do not think it reasonable to suppose that it was intended to permit States to be sued by the simple device of joining a State as a co-complainant, or *by assigning a part of a claim secured by a mortgage* to another State and getting that State to foreclose, making the individual assignor, the chief beneficiary of the suit, a co-defendant with the State.

A suit by South Dakota, and by, or for the benefit of, Charles Salter, against North Carolina, is not merely a controversy between two or more States; it is, in addition to that, a suit by an individual against a State, and so forbidden.

We go further; we contend that this suit is, in purpose and effect—is substantially—one solely by individual holders of the bonds, using the name of the State of South Dakota, against the State of North Carolina.

In *New Hampshire vs. Louisiana,* 108 U. S., 76, Chief Justice Waite said, on page 89:

"No one can look at the pleadings and testimony in these cases without being satisfied, beyond all doubt, that they were in legal effect commenced and are now prosecuted solely by the owners of the bonds and coupons."

The same may be said with greater propriety of the present suit.

Of course the scheme is somewhat varied, but equally transparent. In the New Hampshire and New York cases it was apparently thought that a controversy between two States, justiciable in this Court, could be created by the individual owner of repudiated State bonds transferring the legal title to a State for collection; in this it appears to be thought that the owners of a large number of State bonds, supposed to be secured by a mortgage, can collect their bonds by assigning to a complainant State a few of the bonds, and having that State foreclose the mortgage for the benefit of all; the scheme is, in fact, similar to the other, the difference being merely that the bondholders in this hire the State to bring the suit by giving her a small number of the bonds—a contingent fee, instead of inducing her to do so gratuitously.

The result to the State of North Carolina and to the bondholders is the same—individuals have prosecuted successfully a suit against a State contrary to our understanding of the effect of the New Hampshire case, which is that, by no scheme or contrivance, can a suit commenced, or prosecuted, which, in effect, is a suit by indviduals against a State.

What are the facts?

Simon Schafer and his brother own and control practically all of the bonds sued on, which are claimed to be secured by a second mortgage upon the stock of the North Carolina Railroad Company, owned by the State of North Carolina—they make several unsuccessful attempts to secure better terms than those upon which the State compromised with the vast majority of the holders of similar bonds—they employ numerous counsel, of

record and otherwise, they petition the General Assembly of North Carolina early in 1901 unsuccessfully—former Senator Butler, one of their counsel, induces one of his friends, Senator Pettigrew, to procure the passage of an act of the Legislature of South Dakota for accepting and collecting donations of bonds, etc.—this act is said to have been introduced by Colonel Stewart, who is solicitor of record for complainant, and Governor Herried says was probably employed at the time the donation was made. Governor Russell, counsel for the Schafers, says that the feasibility of assigning a portion of the bonds to some State for purpose of suit was discussed (Record, p. 108), and that he understood, or inferred, that the purpose of the act mentioned above was to enable the State of South Dakota to receive a donation of bonds with a view of bringing suit against the State of North Carolina (Record, p. 108); the Schafers were reluctant to make the donation, but did so and sent with the bonds a letter containing the following sentences:

"Hon. Charles H. Burke,

"Dear Sir:—The undersigned, one of the members of the firm of Schafer Bros., has decided, after consultation with the other holders of the second mortgage bonds issued by the State of North Carolina, to donate ten of these bonds to the State of South Dakota. * * *

> "The bonds are all now about due, besides, of course, the coupons, which amount to some 170 per cent. of the face of the bonds.
>
> "The holders of these bonds have been advised that they cannot maintain a suit against the State of North

Carolina on these bonds, but that such a suit can be maintained by a foreign State or by one of the United States."

Simon Schafer, the active manager of this business and now dead, upon a remonstrance by his brother against the donation, said "it would probably inure to the benefit of the remaining bonds." (Record, p. 74.)

On the other hand, Governor Herried (Record, p. 36), who seems to have had little to do with the matter, it being left to the Attorney-General, Pyle (who is dead), says that the bonds were handed to him on September 21, 1901, and there were present Congressman Burke, Attorney-General Pyle, and his associate counsel, Colonel Stewart, and himself, and that he had understood from Mr. Pyle or Mr. Burke, some weeks before the donation, that a suit upon these bonds might be necessary, and Colonel Stewart had been employed; that none of the authorities of South Dakota had ever made any demand upon the authorities of North Carolina for payment or adjustment, and in explanation of the strange conduct, said he supposed the legal department would do what was proper, he left it to them, and Governor Aycock says the first intimation he had of the matter was from a notice in the papers that an application had been made to this Court for leave to file this bill.

These circumstances, mostly drawn from reluctant witnesses, taken in connection with the allegations of the bill, and the answer of Charles Salter, we think justify us in saying that there can be no doubt that the purpose of the assignment was to have this suit brought, and that, although the donation of the

bonds was absolute and unconditional, the authorities of South Dakota were aware of this purpose and assented to it, tacitly perhaps, but they assented.

We do not think any one can read the pleadings and proofs without seeing that the Schafers are the actors, the moving spirits, the real plaintiffs, and that the suit is instituted in pursuance of a scheme invented by the Schafers, or their counsel, to collect these bonds by hiring the State of South Dakota to bring the suit instead of merely employing counsel to do so.

But in the original argument counsel for the Schafers were understood to admit the transfer was made to the State of South Dakota for the purpose of enabling it to bring this action; and he argued that that was immaterial, that the assignors had a right to make a donation of the bonds, and that the motive or purpose with which the assignment was made was immaterial, and cites several authorities to the effect that if a man does a legal act the motive with which he does it is immaterial in law.

We admit that such is the general rule, and that there are decisions of this Court applying it to cases of jurisdiction arising from differences of citizenship, but even in those cases it is necessary that the assignors should retain absolutely no interest in the thing assigned.

Farmington vs. Pillsbury, 114 U. S., 138.
Cross vs. Allen, 141 U. S., 533.
Lehigh Min., etc., Co. vs. Kelly, 160 U. S., 341.
Lake Co. Commrs. vs. Dudley, 173 U. S., 253.

And this transfer comes within the condemnation of those cases, because, according to the bill and the argument of the

complainant's counsel, the thing assigned was not so much the ten bonds as an interest in the mortgage security, and the assignors not only retained an interest, but almost the whole of the mortgage, so much so as to justify us in saying that the complainant only gets a commission for collection.

Not only that, but there are cases in which the motive makes the difference between the lgality and the illegality of the act done, such as in the cases of assignments for the benefit of creditors, and it seems to us to be arguable that where an assignment is made with the very purpose of accomplishing a result forbidden by the Constitution of the United States, or any amendment thereof, as here by the Eleventh Amendment, that such assignment and transfer is void, especially when the assignee participates in the illegal purpose, as we think is the case here.

If she did not, it is difficult to understand why the authorities of South Dakota did not communicate with those of North Carolina, unless they were afraid settlement would be made and this beautiful scheme thwarted.

We submit, however, that it is not necessary for us to show that the State of South Dakota participated consciously in this scheme—it is sufficient that she, being a mere volunteer, became the passive instrument of the bondholders in carrying it out.

In *Abrams vs. Cureton*, 74 N. C., 523, it was decided that the plaintiff, to whom a note had been endorsed under a contract to collect and pay over the proceeds to the endorser, after retaining compensation for services, could not recover in his own name, because he was not "the real party in interest."

We respectfully insist that that is true here; the State of South Dakota is not the real party in interest; that the suit was commenced, and is prosecuted, solely for the benefit of private individuals, who, in the event of recovery, will be the sole beneficiaries, after deducting the costs of the suit, including the fee to South Dakota.

But whether we are right in this or not, the result of a successful termination of the suit will certainly be to enable private individuals to prosecute a suit against a State.

We do not believe that the prohibitions of the Eleventh Amendment can be so easily nullified.

GEORGE ROUNTREE,
Of Counsel.

ROBERT D. GILMER,
Attorney-General.
JAMES E. SHEPHERD,
JAMES H. MERRIMON,
Counsel for North Carolina.

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Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 8, Original.

THE STATE OF SOUTH DAKOTA, COMPLAINANT,

v.

THE STATE OF NORTH CAROLINA ET AL.

LAWS OF NORTH CAROLINA, SUBMITTED BY THE DEFENDANT, THE STATE OF NORTH CAROLINA.

CHAPTER X.

AN ACT to regulate the form of bonds issued by the State.

SEC. 1. *Be it enacted by the General Assembly of the State of North Carolina*, and it is hereby enacted by the authority of the same, That all certificates hereafter to be issued for any money to be borrowed for the State by virtue of any act now in force, authorizing the same, or of any act which may be hereafter passed for that purpose, shall be signed by the governor and countersigned by the public treasurer, and sealed with the great seal of the State,

and shall be made payable to —— or bearer, and the principal shall be made payable by the State, at a day named in the certificate or bond. And coupons of interest, in such form as may be prescribed by the public treasurer, and to be attached to the certificate, and the certificates and coupons attached thereto, shall be made payable at such bank or place in the city of New York, as he, the public treasurer, may think proper, or at the office of the public treasury at Raleigh, if preferred by the purchaser: *Provided, however,* That no such certificate shall be issued for a less sum than one thousand dollars, and no certificate shall be sold for a less sum than par value.

SEC. 2. *Be it further enacted,* That it shall be the duty of the public treasurer to enter in a book, to be kept for that purpose, a memorandum of such bond or certificate, issued by virtue of this act, the numbers, date of issue, when and where payable, to whom issued, or to whom sold, and at what premium, if any, the same was sold by him.

SEC. 3. *Be it further enacted,* That the bonds or certificates hereafter issued by the State shall not be subject to taxation, and that all laws and clauses of laws coming in conflict with this provision are hereby repealed.

SEC. 4. *Be it further enacted,* That it shall be the duty of the public treasurer to adopt such measures in regard to appropriations made, as may be necessary to receive* the prompt payment of the amount of all coupons as they may become due, and sustain the credit of the State.

SEC. 5. *Be it further enacted,* That this act shall be in force from and after its ratification.

(Read three times and ratified in General Assembly, this 22d day of December, A. D., 1852.)

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* It was no doubt intended that this sentence should read "as may be necessary to *secure* the prompt payment."—PUB. PRINTER.

Chapter 35:

PUBLIC DEBT.

An act concerning public debt.

Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same, as follows:

1. That the bonds of the State for five hundred thousand dollars, issued under the authority of the act of the General Assembly of the year eighteen hundred and forty-six, entitled "An act to provide for the transfer of the bonds of the Raleigh and Gaston Railroad Company, endorsed by the State," and payable on the first day of January, eighteen hundred and sixty: the "certificates of debt" issued on behalf of the State for the sum of two hundred thousand dollars, under the authority of the act of the General Assembly of the year eighteen hundred and forty-eight, entitled "An act to provide for the payment of the debt of the State to the Bank of Cape Fear, to the Bank of the State, and other debts due on account of endorsement by the State for the Raleigh and Gaston railroad," and payable at the end of ten years from the date of the issue of said certificates, respectively: the "certificates of debt" of one hundred and twenty thousand dollars, issued under the authority of the act of the General Assembly of the year 1848, entitled "An act to incorporate the Fayetteville and Western Plank Road Company," and payable at the end of twenty years from the date of the issue: the "certificates of debt" already issued, and which may be issued, for two millions of dollars, under the authority of the act of the General Assembly of the year 1848, entitled "An act to incorporate the North Carolina Railroad Company," and payable at the end of thirty years from the date of their issue: the "certificates of debt" for two hundred thousand dollars, issued under the authority of the

act of the General Assembly of the year 1850, entitled "An act to provide for the payment of the debt of the State," and payable in like time: and all other bonds and "certificates of debt," issued by and in the name of the State, or which may hereafter be issued by the authority of any statute now or hereafter to be enacted shall be duly registered by the public treasurer, in a book to be kept by him for that purpose.

2. All bonds or certificates of debt of the State, which now or hereafter may be issued on behalf of the State, shall be transferable: such as are payable to bearer by delivery, and such as are payable to the holder by name alone, may be transferred by the holder, or by his agent, in a book to be kept for that purpose by the public treasurer, on surrendering for cancellation the outstanding bond or certificate; and in this latter case of transfer, a new bond or certificate for the same amount shall be issued.

3. All bonds or certificates of debt of the State, hereafter to be issued as originals, or as substitutes for such as may be surrendered for transfer, by virtue of any act now or to be hereafter passed, shall be signed by the governor, and countersigned by the public treasurer, and sealed with the great seal of the State, and shall be made payable to such person by name as may be the purchaser, or to bearer; and the principal shall be made payable by the State, at a day named in the bond or certificate. And coupons of interest, in such form as may be prescribed by the public treasurer, shall be attached to the certificate, and the certificates and coupons attached thereto, shall be made payable at such bank or place in the city of New York, as the public treasurer may designate, or at the office of the public treasurer at at Raleigh, if preferred by the purchaser: *Provided, however,* That if the purchaser or holder so may desire, the bond or certificate shall be payable to him alone, and not to bearer: *And provided further,* That no certificate shall issue for a less sum than one thousand dollars, unless the same be issued

for a surrendered bond of less amount: nor shall any original bond or certificate of debt of the State be sold for a sum less than par value: nor shall any such bond or certificate, issuing in lieu of a transferred bond or certificate, be payable elsewhere than may be the original, except by the consent of the holder, it may be made payable at the public treasury.

4. The public treasurer shall enter, in a book to be kept for that purpose, a memorandum of every bond, or certificate of debt of the State, issued or to be issued by the State, under any act whatever, together with the numbers, dates of issue, when and where payable, at what premium, and to whom the same may have been sold or issued.

5. The original bonds, or certificates of debt of the State, which have been issued since the first day of January, eighteen hundred and fifty-three, or which may hereafter be issued, under the authority of any act whatever, as likewise the bonds and certificates substituted for such original bonds and certificates, shall be, they and the interest accruing thereon, exempt from taxation.

6. Guardians, executors and other persons, holding funds in trust to be invested and kept on interest, may, unless prohibited, invest the same in bonds or certificates of debt of the State, or in any securities for the payment whereof the State is responsible, now or hereafter to be issued; and in all settlements they shall be deemed cash, and may be paid as such by transfer thereof to the persons entitled.

7. In every bond or certificate of debt issued by the State, and in the body thereof, shall be set forth the title of the act, with the year of its enactment, under the authority of which the same may be issued, or reference thereto shall be made by the number of the chapter, and the year of the legislative session.

(Ratified the 24th day of January, 1855.)

This chapter is re-enacted by the Revised Code of North Carolina 1856, chapter 96, and brought forward in successive revisions and now forms a part of the present code, chapter 49, volume 2.

CHAPTER THREE.

ACTIONS OTHER THAN FOR THE RECOVERY OF REAL PROPERTY—TIME OF COMMENCING.

SEC. 151. Periods of limitation prescribed (C. C. P., s. 30).

The periods prescribed for the commencement of actions, other than for the recovery of real property, shall be as follows:

SEC. 152. Ten years (C. C. P., ss. 14, 31).

Within ten years—

(1.) An action upon a judgment, or decree of any court of this State, or of the United States, or of any State or Territory thereof, from the date of the rendition of said judgment or decree. But no such action shall be brought more than once nor have the effect to continue the lien of the original judgment:

Broyles *v.* Young, 81–315; Pasour *v.* Rhyne, 82–149; Welfare *v.* Thompson, 83–276; McClenahan *v.* Cotten, 83–332; Lyon *v.* Russ, 84–588; Warren *v.* Warren, 84–614; Goodman *v.* Litaker, 85–8; Fox *v.* Kline, 85–173; McDonald *v.* Dickson, 85–248; Cotten *v.* McClenahan, 85–254; Kendall *v.* Bailey, 86–56: Williams *v.* Mullis, 87–159; Johnston *v.* Jones, 87–393; McDonald *v.* Dickson, 87–404.

(2.) An action upon a sealed instrument against the principal thereto:

Welfare *v.* Thompson, 83–276; Belo *v.* Spach, 85–122; Torrence *v.* Alexander, 85–143; Crawford *v.* McClellan, 85–169.

(3.) An action for the foreclosure of a mortgage, or deed in trust for creditors with a power of sale, of real property, where the mortgagor or grantor has been in possession of the property, within ten years after the forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the same:

Parker *v.* Banks, 79–480.

(4.) An action for the redemption of a mortgage, where the mortgagee has been in possession, or for a residuary interest under a deed in trust for creditors, where the trustee or those holding under him shall have been in possession; within ten years after the right of action accrued:

Edwards *v.* Tipton, 85–478.

SEC. 153. Seven years (C. C. P., s. 32).

Within seven years—

(1.) An action on a judgment rendered by a justice of the peace, from the date thereof:

Barringer *v.* Allison, 78–79; Broyles *v.* Young, 81–315; Daniel *v.* Laughlin, 87–433.

(2.) By any creditor of a deceased person against his personal or real representative, within seven years next after the qualification of the executor or administrator and his making the advertisement required by law, for creditors of the deceased to present their claims, where no personal service of such notice in writing is made upon the creditor; and a creditor thus barred of a recovery against the representative of any principal debtor shall also be barred of a recovery against any surety to such debt:

McKeithan *v.* McGill, 83–517; Cox *v.* Cox, 84–138; Bacon *v.* Berry, 85–124; Vaughan *v.* Hines, 87–445; Leake *v.* Covington, 87–501.

SEC. 154. Six years (C. C. P., s. 33).

Within six years—

(1.) An action upon the official bond of any public officer: Hewlett *v.* Schenck, 82–234; Hughes *v.* Newsom, 86–424.

(2.) An action against any executor, administrator, collector, or guardian on his official bond, within six years after the auditing of his final accounts by the proper officer, and the filing of such audited accounts as required by law:

Briggs *v.* Smith, 83–306; Vaughan *v.* Hines, 87–445.

(3.) An action for injury to any incorporeal hereditament: Boyden *v.* Achenbach, 79–539.

SEC. 155. Three years (C. C. P., s. 34).

Within three years—

(1.) An action upon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding sections:

R. R. Co. *v.* Avery, 64–491; Knight *v.* Braswell, 70–709; Guano Co. *v.* Willard, 73–521; Blackwell *v.* Claywell, 75–215; Austin *v.* Dawson, 75–523; Egerton *v.* Logan, 81–172; Hewlett *v.* Schenck, 82–234; Welfare *v.* Thompson, 83–273; Green *v.* College, 83–449; Capell *v.* Long, 84–17; Reed *v.* Exum, 84–130; Oates *v.* Lilly, 84–643; Timberlake *v.* Green, 84–658; Miller *v.* Lash, 85–51; Torrence *v.* Alexander, 85–143; Jolly *v.* Bryan, 86–457; Moore *v.* Com'rs, 87–209; Robertson *v.* Dunn, 87–191.

(2.) An action upon a liability created by statute, other than a penalty or forfeiture, unless some other time be mentioned in the statute creating it.

(3.) An action for trespass upon real property:

Spilman *v.* Roanoke Nav. Co., 74–675; King *v.* Little, 77–138.

(4.) An action for taking, detaining, converting or injuring any goods or chattels, including action for their specific recovery:

Hewlett *v.* Schenck, 82–324; Etheridge *v.* Woodley, 83–11; Currie *v.* McNeill, 83–176.

(5.) An action for criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereinafter enumerated.

(6.) An action against the sureties of any executor, administrator, collector or guardian, on the official bond of their principal; within three years after the breach thereof complained of:

Bushee *v.* Surles, 77–62; Spruill *v.* Sanderson, 79–466; Walton *v.* Pearson, 85–34.

(7.) An action against bail; within three years after judgment against the principal, but bail may discharge himself by a surrender of the principal, at any time before final judgment against the bail.

(8.) Fees due to any clerk, sheriff or other officer, by the judgment of a court; within three years from the time of the judgment rendered, or of the issuing of the last execution therefor.

1879, c. 251.

(9.) An action for relief, on the ground of fraud or mistake, in cases which heretofore were solely cognizable by courts of equity, the cause of action in such cases not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting such fraud or mistake:

Young *v.* Phifer, 72–529; Barham *v.* Lomax, 73–76; Ross *v.* Henderson, 77–170; Wilson *v.* Land Co., 77–445; Blount *v.* Parker, 78–128; Kahnweiler *v.* Anderson, 78–133; Spruill *v.* Sanderson, 79–466; Egerton *v.* Logan, 81–172; Briggs *v.* Smith, 83–306; Day *v.* Day, 84–408; Hughes *v.* Whitaker, 84–640; Knight *v.* Houghtalling, 85–17.

SEC. 156. One year (C. C. P., s. 35).

Within one year—

(1.) An action against a sheriff, coroner or constable, or other public officer, for a trespass under color of his office:

Hewlett *v.* Nutt, 79–263.

(2.) An action upon a statute, for a penalty or forfeiture, where the action is given to the State alone, or in whole or in part to the party aggrieved, or to a common informer, except where the statute imposing it prescribes a different limitation:

Hewlett *v.* Nutt, 79–263.

(3.) An action for libel, assault, battery or false imprisonment.

(4.) An action against a sheriff, or other officer, for the escape of a prisoner arrested or imprisoned on civil process.

(5.) An action by a creditor of any deceased person, on whom personal notice in writing, to present his claim to the personal representative of the deceased, has been served, and who has failed so to do, within one year after the service of such notice; and any such creditor, barred of a recovery against the personal representative of a principal debtor, by reason of such default, shall also be barred of a recovery against the surety for such debt.

SEC. 157. Six months (C. C. P., s. 36).

Within six months—

An action for slander.

SEC. 158. For other relief within ten years (C. C. P., s. 37).

An action for relief not herein provided for must be commenced within ten years after the cause of action shall have accrued:

Libbett *v.* Maultsby, 71–345.

Ross *v.* Henderson, 77–170.

McDonald *v.* Dickson, 85–248.

SEC. 159. Limitations to apply to actions by the State (C. C. P., s. 38).

The limitations prescribed in this chapter shall apply to civil actions brought in the name of the State, or for its benefit, in the same manner as to actions by or for the benefit of private parties.

SEC. 160. Actions upon an account current, when cause accrues (C. C. P., s. 39).

In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the latest item proved in the account, on either side:

Robertson *v.* Pickerell, 77–302; Mauney *v.* Coit, 86–463.

FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 8, Original.

THE STATE OF SOUTH DAKOTA, Complainant,

vs.

THE STATE OF NORTH CAROLINA ET AL.

ADDITIONAL BRIEF FOR THE STATE OF NORTH CAROLINA.

James H. Merrimon, Counsel.

Robert D. Gilmer,
Attorney General of North Carolina.
James E. Shepherd,
George Rountree,
Of Counsel.

John C. Dowling, Printer, Washington, D. C.

Supreme Court of the United States.

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THE STATE OF SOUTH DAKOTA, COMPLAINANT,

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ADDITIONAL BRIEF FOR THE STATE OF NORTH CAROLINA.

THE BONDS.

In the first paragraph of its complaint the plaintiff alleges its ownership of ten bonds of the defendant State, and attaches to its complaint, as a part of it, a copy of one of the bonds; and further alleges that "*said bonds the said defendant duly executed and sealed with its seal;*" and further, that "each and every one of said bonds is dated July 1st, 1867, is of the par or principal of one thousand dollars and has matured and become due on the 1st day of July, 1897, and has to it attached semi-annual coupons which fell due from January

1, 1869, to July 1, 1897, inclusive, each of said coupons calling for the sum of thirty dollars, being at the rate of six per centum per annum on said principal" (Record, p. 2).

In answer to this paragraph of the complaint the defendant State says that she denies the alleged ownership, but says further: "That if the complainant is in the possession of said writings obligatory, by assignment or otherwise, such transfer of possession and indicia of ownership are purely colorable and collusive, and made for the purpose of evading the provisions of the 11th amendment of the Constitution of the United States;" and then "denies any and all parts of" this paragraph not admitted, and thus puts in issue the alleged execution of the bonds.

The bonds were not "duly executed and sealed with" the seal of the State, and are not the bonds of the State.

When the charter of the North Carolina Railroad Company was granted (27th of January, 1849, Record, p. 149), the State's indebtedness was not evidenced by bonds with coupons attached, and it was provided in the 38th section of that charter (Record, foot of p. 145), that the public treasurer should "issue the necessary certificates, signed by himself and countersigned by the comptroller," but no seal to the certificate was required. At the next session of the General Assembly, which convened on the third Monday of December, 1852, an act was passed entitled "*An act to regulate the form of bonds issued by the State,*" the first section of which provided as follows:

"That all certificates hereafter to be issued for any money to be borrowed for the State by virtue of any act now in force, authorizing the same, or of any act which may be hereafter passed for that purpose, shall be signed by the governor and countersigned by the public treasurer, and sealed with the great seal of the State, and shall be made payable to —— —— or bearer, and the principal shall be made payable by the State, at a day named in the certificate or bond. And coupons of interest, in such form as may be prescribed by the public treasurer, and to be attached to the certificate, and the certificates and coupons attached thereto, shall be made payable at such bank or place in the city of New York, as he, the public treasurer, may think proper, or at the office of the public treasury at Raleigh, if preferred by the purchaser: *Provided, however*, That no such certificate shall be issued for a less sum than one thousand dollars, and no certificate shall be sold for a less sum than par value."

Public Laws 1852, chap. 10, sec. 1.

At the following session of the General Assembly (1854–'55) an act was passed entitled "*An act concerning public debt*" (Public Laws 1854–'55, chap. 35), by the third section of which it was provided:

"All bonds or certificates of debt of the State, hereafter to be issued as originals, or as substitutes for such as may be surrendered for transfer, by virtue of any act now or to be hereafter passed, shall be signed by the governor, and countersigned by the public treasurer, and sealed with the great seal of the State, and shall be made payable to such person by name as may be the purchaser, or to bearer; and the principal shall be made payable by the State at a day named in the bond or certificate."

The remainder of this section is the same substantially as the first section of the act of 1852. It is further provided by the act of 1855 (section 7) as follows:

"In every bond or certificate of debt issued by the State, *and in the body thereof*, shall be set forth the title of the act, with the year of its enactment, under the authority of which the same may be issued, or reference thereto shall be made by the number of the chapter, and the year of the legislative session."

At this same session of the legislature the "*Revised Code*" was enacted, and included the act concerning the public debt, as chapter 90, and by chapter 121 of the Revised Code, section 1, it was provided that the chapter entitled "Public debt," and some other chapters, should "take effect from and after thirty days after the rise of this session of the General Assembly." This law concerning the public debt will be found in "*Battle's Revisal*," chapter 94, and in the present *Code of North Carolina*, volume 2, chapter 49.

By section 36 of chapter 52, *Revised Statutes* (1835), "all acts of the General Assembly of this State shall be in force only from and after thirty days after the rise of the General Assembly in which such act shall have passed, and not before," unless "expressly otherwise directed," and such is the law today.

The charter of the Western North Carolina Railway Company was granted at the session of the General Assembly of 1854–'55 (Record, p. 116), and many of its provisions will be found to be mere copies from the charter of the North Carolina Railroad Company. By section 35 (Record, foot of p. 124) it is provided:

"That as soon as it may become necessary to borrow the money for the payment of the subscription by this act authorized, the public treasurer shall issue coupon bonds, signed by himself and countersigned by the comptroller."

But no provision is made for a seal.

As no day was fixed in this charter for it to take effect, it followed the general rule above stated.

ARGUMENT.

The copy of the bond made part of the complaint (Exhibit A) shows upon its face that the original was not executed in accordance with the requirements of the law concerning the "*public debt*" of the State. The bond was not signed by the governor, nor countersigned by the public treasurer, nor was it sealed with the great seal of the State, nor was the act under which it purported to have been issued recited in the body of the bond, "or reference thereto * * * made by the number of the chapter, and the year of the legislative session." The provision of the charter of the Western North Carolina Railroad Company above quoted was substantially a copy of the 38th section of the North Carolina Railroad Company, and constituted no part of a contract between the State and the railroad company, and was not intended to supersede the public law.

The question of the power of the legislature to pass a law impairing the obligation of a contract does not arise. As said in Stone *v.* Mississippi, 101 U. S., top of p. 817:

"If there is no contract, there is nothing in the grant on which the Constitution can act. Consequently, the first in-

quiry in this class of cases is, whether a contract has been entered into, and if so, what its obligations are."

It will scarcely be insisted that one of the obligations of the State under the charter of the Western North Carolina Railroad Company was to permit its bonds to be executed and issued without being sealed with the great seal of the State. There is no way of reconciling the provision in the 35th section of the charter of the Western North Carolina Railroad Company, in relation to the execution of the bonds of the State, with the general law on the subject.

In State *v.* Bell, 25 N. C. (3 Ire. L.), pp. 506, 508, it is said:

"All acts passed at the same session of the legislature are to be considered as but one statute."

This is repeated in State *v.* Melton, 44 N. C. (Busby), 49, 51, and the court further said:

"Every statute must receive a reasonable construction, and its letter is often departed from to carry out the manifest intention of the law-makers; and to arrive at a proper construction, when the words are doubtful, it is the duty of the courts of justice to examine and compare the different parts of the same statute, and with the others made *in pari materia*. At the session of the legislature in 1836 all the acts previously in force were re-enacted, and they consequently constitute but one act. * * *" (Foot of p. 51, 44 N. C.): "It is a rule in the construction of statutes that all statutes which relate to the same subject-matter, although some of them may be expressed, or not referred to, must be taken to be one system, and so construed: 1st Bur., 447; 3 Mass. R., 212; Lord Bacon's 3d Rule, vol. 6, 382." (See also Jordan *v.* Wilson, 124 N. C., p. 683.)

Now, at the session of the legislature of 1854–'55 all the acts previously in force were re-enacted and became one statute, called the "Revised Code," and whatever is contained in that statute, or collection, that is *in pari materia* with any of the provisions of charters granted at the same session will be taken as one system and so construed, and all charters granted before that time containing like provisions may be considered.

It is noticeable that by section 38 of the charter of the North Carolina Railroad Company the public treasurer and comptroller were authorized to execute, not bonds, but certificates requiring no seal, while in section 35 of the charter of the Western North Carolina Railroad Company the same officers were apparently authorized to execute bonds, but there was no provision for any seal. It is fair to presume that the legislature had in mind the provision in the charter of the North Carolina Railroad Company, for that section concludes as follows:

"But no greater number of such certificates shall be issued at any one time, than may be sufficient to meet the installments required to be paid by the State at that time."

There could not be a bond without a seal.

In Shepherd's Touchstone, 367, it is said:

"An obligation is a deed in writing whereby one man doth bind himself to pay a sum of money or do some other thing."

In Patterson *v.* Galliher, 122 N. C., 511, it was held, by the supreme court of North Carolina, that, where a statute directed a sheriff to execute a deed to land sold for taxes,

and prescribed a form of such deed which had no seal, the execution by the sheriff of a paper in the exact form prescribed, without a seal, was not a deed. The court said:

"It is not to be doubted that the General Assembly could, if it chose to do so, prescribe a form of deed dispensing with a seal, but, has it done so? is the question. Under the common law, and always in North Carolina, except for the two years between the 7th of March, 1879, and 5th March, 1881, a seal has been held to be absolutely indispensable to the validity of deeds in which is conveyed a greater estate in lands than a three year lease. The conveyance prescribed by statute for sheriff's deeds for taxes is called a deed in the statute as well as in the body of the instrument; and as we have said the attestation clause reads as if a seal was to be affixed. There are no express words used in the statute which alter the general law requiring the affixing of seals to deeds for land, and we cannot arrive at the conclusion that a change so important can be made by implication. The conveyance being called a deed in the statute, and no reference being made in the statute to the dispensing with the necessity of a seal, the word 'deed' must be construed to mean a deed under our general law, and our general law requires a seal to all deeds to land except as to the modification pointed out. In Kitchen *v.* Tyson, 7 N. C. (3 Mur.), 314, the court said: 'Now it is a rule that where a statute makes use of a word, the meaning of which was well ascertained [illegible] common law, the word shall be understood in the same [illegible] it was at common law.'"

In respect of the matter of a seal, there is no distinction between a deed and a bond in North Carolina (Delius *v.* Cawthorn, 13 N. C. (2 Dev. L.), 90; McKee *v.* Hicks, *ib.*, 379). In Vanhook *v.* Barnett, 15 N. C. (4 Dev. L.), at page 270, it is said:

"A bond not executed pursuant to the provisions of the act of 1825, though not good as an official, operates as a *common-law bond.*"

In Graham *v.* Holt, 25 N. C. (3 Ir. L.), top of page 302, it is said:

"A bond is the acknowledgment of a debt *under seal*, the debt being therein particularly specified. In every good bond there must be an obligor and an obligee, and a sum in which the former is bound (Shep. Touch., 56; Com. Dig., *Obligation A*)."

And in this same case it is said:

"The notion with us has always been, what we learned from Co. Lit., 52 (a), and the Touchstone, 57, that he who executes a deed as agent for another, be it for money or other property, must be armed with an authority under seal (McKee *v.* Hicks, 2 Dev., 379; Davenport *v.* Speight, 2 Dev. & Bat., 381). The insertion of the sum in the blank space was intended to consummate the deed; it was done without *legal authority*, and the instrument is void as a bond."

So, what we have quoted from Patterson *v.* Galliher, *supra*, in relation to the necessity for a seal to make a deed applies with equal force to the execution of a bond, and it is manifest, it should seem beyond controversy, that nothing could be the bond of the State, after the passage of the acts of 1852, 1854-'55, and the incorporation of these acts into the Revised Code, unless the bond was signed by the governor and countersigned by the public treasurer and sealed with the great seal of the State. There has been no legislation changing the law in this respect.

I am not inadvertent to what was said in State *v.* Stoll, 17 Wall., 425, viz:

"The provisions of a special charter or a special authority derived from the legislature are not affected by general legislation on the subject. The two are to be deemed to stand together; one as the general law of the land, the other as the law of the particular case."

Citing Dillon on Municipal Corporations, section 54, where it is said:

"If both the general and special acts can stand, they will be construed accordingly. If one *must* give way it will depend upon the supposed intention of the law-maker, to be collected from the entire course of legislation, whether the charter is superseded by the general statute, or whether the special charter provisions apply to the municipality, in exclusion of the general enactments. So particular provisions of charters should be read and construed in the light of the whole instrument, of all preceding charters, of the general legislation of the State, and of the object of the legislature in the erection of municipalities, as before explained."

All doubt as to the intention of the legislature in respect of the manner of executing bonds of the State is removed by the plain words of the act of 1885:

"All bonds * * * of the State, hereafter to be issued as originals, or as substitutes for such as may be surrendered for transfer, *by virtue of any act now or to be hereafter passed*, shall be signed by the governor, and countersigned by the public treasurer, and sealed with the great seal of the State."

Cardinal rule gives effect to every word and every part of a statute (Washington Market Co. *v.* Hoffman, 101 U. S., 112; Platt *v.* R. R. Co., 99 U. S., 48).

The legislature meant by the phrase "any act now or to be hereafter passed," any act passed or to be hereafter passed at that session of the legislature. Of course that legislature did not mean or undertake to bind future legislatures. This being so it follows that the language of the general law amounts to an express repeal of the provision of section 35 of the charter of the Western North Carolina Railroad Company empowering the public treasurer to execute bonds of the State without a seal. It is certain that the treasurer's seal is not the great seal of the State, and that nothing less than a positive statute could make the seal of the treasurer answer for a seal to bonds of the State. It is no answer to this to say that the practice was, or had been, for the public treasurer to sign and affix his official seal to the bonds of the State. No practice inconsistent with the perfectly clear meaning of a statute can have any effect (United States *v.* Alger, 152 U. S., middle of p. 397, and cases there cited; Studebaker *v.* Perry, 184 U. S., 268–269; Webster *v.* Luther, 163 U. S., foot of p. 341; Wisconsin Central Road *v.* United States, 164 U. S., 205). Even if the language of said section 35 raised a doubt (if that section could be regarded as granting a privilege to that company), it would be construed as being *in pari materia*, with the other statutes cited, and most strongly in favor of the State.

Hannibal & St. J. R. Co. *v.* Missouri River Packet Company, 125 U. S., 260, 271, and cases there cited.

In Winslow *v.* Morton, 118 N. C., 486, 492, it is said:

"Where a later or revising statute clearly covers the whole subject matter of antecedent acts and it plainly appears to have been the purpose of the legislature to give ex-

pression in it to the whole law on the subject, the latter is held to be repealed by necessary implication (Matter of N. Y. Institution, 121 N. Y., 234; U. S. *v.* Tynen, 11 Wall., 88; Jernigan *v.* Holden, 34 Fla., 530; U. S. *v.* Ranlett & Stone, 172 U. S., foot of page 140)."

Besides, if the plaintiff intended to assert that the execution of the alleged bonds was authorized by some special provision of a statute other than the general law, it was its duty to make this known by proper averments in the complaint (Corporation Commission *v.* Railroad, 127 N. C., 283, 285), but instead of doing this it alleges that the bonds were "duly executed and sealed with its seal," whereas it is perfectly plain that they were not duly executed and were not sealed with its seal. This court said in Hanley *v.* Donoghue, 116 U. S., top of page 6:

"When exercising an original jurisdiction under the Constitution and laws of the United States, this court as well as every other court of the National Government, doubtless takes notice, without proof, of the laws of the United States."

And, of course, this court will take judicial notice of the manner prescribed for the execution of bonds of the State of North Carolina, as the manner of their execution is prescribed by public law.

In Fourth National Bank *v.* Francklyn, 120 U. S., at page 751, the court said:

"In the court below, statutes and decisions of Rhode Island were agreed or proved and found as facts, in seeming forgetfulness of the settled rule that the circuit court of the United States, as well as this court, on appeal or error from that court, takes judicial notice of the laws of every

State of the Union (Hanley *v.* Donoghue, 116 U. S., 1, 6, and cases there collected). No reference was made to the statute of 1877, c. 600, to which the plaintiff has now referred, and which repeals and modifies in some respects the statutes agreed and found in the record to be still in force; and it is contended for the defendant that the court should not review a judgment on a ground which was not presented to the court below. That is doubtless the general rule. But it would be unreasonable to apply it when the effect would be to make the rights of the parties depend upon a statute which, as we know, and are judicially bound to know, is not the statute that governed the case."

In Mills *v.* Green, 159 U. S., foot of page 657, it is said:

"The lower courts of the United States, and this court on appeal from their decision, take judicial notice of the constitution and public laws of each State of the Union. * * * Taking judicial notice of the constitution and laws of the State, this court must take judicial notice of the days of public elections of members of the legislature, or of a convention * * *, as well as of the times of the commencement of the sitting of those bodies and of the dates when their acts take effect."

And the court "in the ascertainment of any facts of which the judges are bound to take judicial notice, as in the decision of matters of law which it is their office to know, * * * may refresh their memory and inform their conscience from such sources as they deem most trustworthy."

Jones *v.* United States, 137 U. S., 202.

But the court will take judicial notice of a charter granted by the legislature of a State only when the legislature declares it to be a public act.

Case *v.* Kelly, 133 U. S., 21.

The distinction between public and private legislative acts is kept up in North Carolina, and it has been expressly held that the statute incorporating the North Carolina Railroad Company is a private act of which the courts will not take judicial notice.

Durham *v.* Railroad, 108 N. C., 399.

There has never been any act of the legislature of North Carolina declaring the charter of any railroad company to be a public act, so far as I know, and the courts of the State do not take judicial notice of such charters. Hence, if it had been the purpose of the plaintiff to rely upon section 35 of the charter of the Western North Carolina Railroad Company, as furnishing authority to the treasurer of the State to execute the bonds, it should have set it forth in its complaint as has been shown.

Now, to conclude upon this branch of the first issue: Suppose we take all the acts and provisions of acts relating to the public debt as *in pari materia*, to-wit: the acts of 1852 and 1855, and chapter 90, Revised Code, and section 38 of the North Carolina Railroad Company, and section 35 of the charter of the Western North Carolina Railroad Company, and give to each all the effect possible; still, nothing would or could be a bond of the State without being "sealed with the great seal of the State." As we have shown, the one indispensable requisite of a bond or deed is a seal, and of a bond or a deed of the State, the great seal of the State, unless by statute some other seal is provided.

Then, as by all the acts and provisions of acts referred to, the public debt of the State could only be evidenced by bonds of the State, executed in accordance with those acts

and provisions of acts, it follows that the alleged "writings obligatory," the plaintiff claims to own, are not evidence of an indebtedness to the State. They are not bonds of the State, and they are not contracts of the State which any agents of the State were authorized to execute.

In the discussion of this first issue I have deemed it well to treat it, to some extent, as if the facts made a case for the application of the rule that "several acts *in pari materia*, and relating to the same subject, are to be taken together and compared, in the construction of them, because they are considered as having one object in view, and as acting upon one system (1 Kent's Com., 12th ed., 463).

But I have also endeavored to show that this rule cannot be invoked under the facts of this case.

Unless the court should hold that, in order to the due execution of the bonds of the State, the governor and public treasurer should both sign them, and the public treasurer and comptroller should both countersign them, and that they should be sealed with the great seal of the State; or, that so far as the bonds to be issued in aid of the Western North Carolina Railroad Company were concerned, they were to be signed by the public treasurer and countersigned by the comptroller pursuant to the provisions of said section 35 of the charter, and be sealed with the great seal of the State, under the provisions of the general law, then it would seem quite impossible to apply the rule above stated. While ordinarily a special law is not repealed by a subsequent general statute unless the intent so is obvious, yet there is no rule to prevent the latter from applying to cases not provided for by the former.

Johanson *v.* Washington, 190 U. S., top of p. 185.

I think that I have clearly shown that section 35 of the *charter* of the Western North Carolina Railroad Company was abolished, in so far as the *execution* of the bonds of the State was concerned, both by the act of 1855, concerning *public debt*, and by chapter 90 of the Revised Code (Rodgers *v.* U. S., 185 U. S., foot of p. 87). I by no means concede that any of the formalities prescribed by chapter 90 of the Revised Code could be dispensed with in the execution of the bonds of the State "after thirty days after the rise" of the session of the General Assembly of 1854–'55, and I propose to give further reasons for not making such concession under my next proposition, to wit:

The signature of the governor and the countersignature of the public treasurer and the great seal of the State were absolutely indispensable to a valid execution of the bonds.

In the case of McGarrahan *v.* Mining Co., 96 U. S., 316, 320, this court had under consideration the execution of a patent of the United States for land under an act of Congress, and near the foot of page 320 said:

"Thus it appears that a patent for lands must be signed in the name of the President, either by himself or by his duly appointed secretary, sealed with the seal of the General Land Office, and countersigned by the recorder. Until all these things have been done, the United States has not executed a patent for a grant of lands. Each and every one of the integral parts of the execution is essential to the perfection of the patent. They are of equal importance under the law, and one cannot be dispensed with more than another. Neither is directory, but all are mandatory. The question

is not what, in the absence of statutory regulations, would constitute a valid grant, but what the statute requires. Not what other statutes may prescribe, but what this does. Neither the signing nor the sealing nor the countersigning can be omitted, any more than the signing or the sealing or the acknowledgment by a grantor, or the attestation by witnesses, when by statute such forms are prescribed for the due execution of deeds by private parties for the conveyance of land. It has never been doubted that in such cases the omission of any of the statutory requirements invalidates the deed. The legal title to lands cannot be conveyed except in the form provided by law."

In this case the patent was not produced upon the trial, but the plaintiff put in evidence a certified copy which failed to show that the patent had been countersigned by the recorder, and in stating the case Mr. Chief Justice Waite, in stating the facts, said that "the only question decided by this court is, whether the exemplification admitted on the trial of the cause shows upon its face the execution of a patent sufficient in law to pass the title of the United States."

It was contended that the recorder had recognized the completeness of the patent, and that this was equivalent to his counter-signature, but the court said:

"The case is, therefore, one in which the record shows upon its face an instrument prepared for a patent but not countersigned by the recorder. If a patent thus defectively executed had itself been introduced in evidence, it would not have shown a grant actually perfected. The law is not satisfied with the simple recognition of the validity of a patent by an officer of the Government. To be valid, a patent must be actually executed. Before it can operate as a grant,

the last formalities of the law prescribed for its execution must be complied with. No provision is made for an equivalent of these formalities. Even an actual delivery of a patent by the recorder in person would not supply the place of his counter-signature, any more than the delivery of a paper by a private person without being signed would make it his deed."

This case was cited as authority in Bissell *v.* Spring Valley Township, 110 U. S., 162, where a statute which required township bonds to be executed in a particular manner was in question. There the signature of the clerk was essential to the valid execution of the bonds, and the clerk had not signed them. The bonds were held to be invalid. The case of Anthony *v.* County of Jasper, 101 U. S., 693-697, was also cited.

A statute of Texas provided that bonds to be issued by a city should be signed by the mayor. The bonds were not signed by the mayor, but, under a resolution of the city council, were signed by a private citizen who had been mayor, but had gone out of office and been succeeded by a new mayor. The bonds were held invalid, and the court said, "but we have always held that even *bona fide* purchasers of municipal bonds must take the risk of the official character of those who execute them. An examination of the records of the city in regard to the issuing of the bonds would have disclosed the fact that the bonds had not been signed and issued under the ordinance of September 13th, 1883, until July 3rd, 1884; that W. N. Hodge was not mayor on that day, and that the person who then signed the bonds as mayor was a private citizen."

Coler *v.* Cleburne, 131 U. S., top of page 173: The court cited in this case Anthony *v.* County of Jasper, 101 U. S., 693, where Chief Justice Waite said:

"The public can act only through its authorized agents, and it is not bound until all who are to participate in what is to be done have performed their respective duties. The authority of a public agent depends on the law as it is when he acts. He has only such powers as are specifically granted. * * * The question is one of the authority of him who attempts to bind another. Every person who deals with or through an agent assumes all the risk of lack of authority in the agent to do what he does. Negotiable paper is no more protected against this inquiry than any other."

There Has Been no Ratification of the Bonds.

It is contended on behalf of the plaintiff and its associates that the defendant State has recognized and ratified the bonds. This is denied by the defendant, and there is no evidence to establish the affirmative of this issue.

By chapter 98, Laws of 1879, section 4, it was enacted:

"Class 2. For the bonds issued since the close of the war, by authority of acts passed before the war to aid in the construction of the Western North Carolina railroad, * * * twenty-five per cent. of the principal of the bonds or certificates so surrendered."

This brings us to the consideration of the second paragraph of the complaint and the defendant's answer thereto.

The complaint alleges that the bonds were issued under and by virtue of an act of the General Assembly of North Carolina entitled "An act to incorporate the Western North

Carolina Railroad Company," ratified the 15th day of February, 1855, being chapter 228 of the Acts of 1854–'55, and of an act amendatory thereof, to wit, chapter 106 of the Laws of 1866–'67, ratified the 19th day of December, 1866, entitled "An act to enhance the value of the bonds to be issued for the completion of the Western North Carolina railroad and for other purposes" (Record, p. 2).

The defendant in its answer admits that the writings were issued by the treasurer and purported to be issued under the acts named, but denies that they were issued and sold according to the provisions of said act, and sets forth the provisions of the act, and then denies all that has not been admitted. The evidence in the case shows that the so-called bonds were not issued in accordance with the act mentioned, even if they had been properly executed, and they therefore do not fall within the terms of the act of 1879.

But it is insisted that other bonds of the same class have been exchanged and new bonds issued by the agents of the State. If this were true it would not support the contention of the plaintiff. Unauthorized acts of the State's agents can have no effect to change the law prescribing how the bonds shall be issued, nor to alter the fact that they were not issued as the law prescribed. To sustain this view the authorities already cited are abundant.

Besides, the plaintiff in its bill of complaint does not rely upon any recognition or ratification of the bonds, but solely upon their due execution and issue, and we have shown, as we think, conclusively, that they were neither duly executed nor duly issued. The law was violated both in its letter and its spirit. The act of December 19, 1866, had for its chief purpose the enhancement of the value of the bonds of the

State. By the express provisions of the charter of the Western North Carolina Railroad Company, and of the general law as well, the public treasurer was bound to sell the bonds himself and to get the money into his own hands to pay for the State's stock, and he was not to sell any bond at less than par. By no stretch of construction could the public treasurer claim authority under the law to turn over the bonds to the president or other officer of the railroad company in payment of the stock. The very purpose of the law was to prevent such handling of the bonds of the State, and the result of the public treasurer's conduct in this instance abundantly proved the wisdom of the law.

Discredited bonds—Trask *v.* Railroad Co., 124 U. S., 516.

The president of the Western North Carolina Railroad Company was a State officer, but not one designated or authorized to handle the bonds of the State. The treasurer of the State, Mr. Battle, testified that he knew that the act required that the bonds should be sold for money and at not less than par (Record, foot of p. 91), and that in disposing of the bonds to the president or treasurer of the railroad company he did not sell them for cash, but simply turned them over to the company in lieu of paying money, and that he did this because he knew at the time that the bonds could not be sold at par. The whole transaction was a violation of the law, and the bonds were certainly invalid as between the State and the railroad company, and those who purchased them at from 25 to 40 cents on the dollar knew they were discredited bonds. The attempt of the counsel for the bondholders to make this witness say that there was no dif-

ference between turning over the bonds to the president of the railroad company and paying over money resulted in a miserable failure. The witness testified that the difference was very apparent; that the company would get the bonds and sell them for less than par and would not get the benefit of the difference between the amount they got and par. Besides it will be noted that the State owned two-thirds of the capital stock of the railroad company.

THE MORTGAGE.

Plaintiff alleges, in the third paragraph of its complaint, that at the time of the passage of the act of 1866 (ch. 106, Laws 1866–'67) the State of North Carolina owned thirty thousand shares of stock in the North Carolina Railroad Company, of the par value of $3,000,000, subject to a lien or first mortgage; and that said act of 1866 directed the State treasurer to mortgage, for the security of the bonds held by the plaintiff and others, stock of the State in the North Carolina Railroad Company (Record, pages 2–3).

The defendant answers admitting its ownership of stock and that the treasurer was directed to execute mortgages of this stock when certain bonds were regularly and lawfully issued under the act mentioned; but averred that the act required that the mortgages should be executed and perfected in a particular form and manner, but were not so executed and were not mortgages.

The chief purpose of the act of 1866 was that the State might obtain par, at least, for its bonds to be issued after its passage in aid of the Western North Carolina Railroad Company. The preamble of the act says:

"Whereas, it is manifestly the interest of the people of the whole State that the residue of the bonds, when issued, shall command a high price in the market; therefore,

"SECTION 1. *Be it enacted* * * * That the public treasurer be and he is hereby authorized and *directed*, whenever it shall become his duty under the provisions of said acts, passed at the sessions of 1854–'55 and 1860–'61, to issue bonds of the State to the amount of fifty thousand dollars or more, to mortgage an equal amount of the stock which the State now holds in the North Carolina railroad, as collateral security for the payment of said bonds, and to execute and deliver with each several bond, a deed of mortgage for an equal amount of stock to said North Carolina railroad, said mortgage to be signed by the treasurer and countersigned by the comptroller, to constitute a part of the bond," &c. (Record, p. 11).

At the same session at which this act was passed another act was passed to supplement it, which provided that the Western North Carolina Railroad Company might "put under contract, at any time they may deem advisable, any portion of said road to the western terminus," &c.; and, further, that "whenever one-third the estimated cost of said portions or sections (such portions or sections to embrace at least fifty thousand dollars' worth of work at the estimated cost), have been subscribed by solvent individuals, counties, corporations, or contractors, the treasurer of the State is hereby authorized and empowered to issue bonds of the State for the remaining two-thirds, as provided by an act passed at the present session of the General Assembly (entitled 'An act to enhance the value of the bonds to be issued for the Western North Carolina railroad, and for other purposes') upon the certificate of the president of the said road

to the board of internal improvements, that the stock has been subscribed as above required," &c.

Record, p. 170.

The North Carolina railroad was incorporated in 1849 with a capital stock of $3,000,000 (Record, p. 136). By section 4 of its charter "all subscriptions of stock shall be in *shares* of one hundred dollars," (Record, p. 138), and it is provided by section 22 "that said company shall issue certificates of stock to its members;" by section 36 the "board of internal improvements" was authorized to subscribe on behalf of the State, for stock in said company, to the amount of two millions of dollars to the capital stock of said company, and by sections 37 and 38 provision was made for the payment of the subscription (Record, p. 145).

The General Assembly in 1855 (Laws 1854–'55, Record, p. 149) passed an act instructing the treasurer to subscribe for ten thousand "*additional shares* of the capital stock in the North Carolina Railroad Company," and to pay for these shares by issuing and making sale "of the bonds of the State under the same provisions, regulations and restrictions prescribed for the sale of the bonds * * * issued and sold to pay State's *original* subscription of stock of said company," and this new subscription was to be preferred stock. The "original" and "additional" and preferred stock was subscribed for by the State and paid for.

The State then became the owner of two classes of stock, "common, original," and "additional preferred."

Even without a statute stock in a railroad company is ordinarily classed as "common and preferred."

Elliott, in his work on railroads, vol. 1, sec. 77, says:

"Corporate stock—using that term in the sense in which it is generally used in this connection—may be divided into two principal classes, common and preferred."

The mortgage in question, in the case at bar, a copy of which appears as part of Exhibit A to plaintiff's complaint, purports to be a mortgage of "ten shares of the stock * * * *originally* subscribed for by the State," and this copy, it is admitted, contains the identical words of all the mortgages. It thus appears that none of the ten thousand shares that the treasurer subscribed for on behalf of the State, under the act of 1854–'55, is affected by the so-called second mortgage,

It is claimed by the plaintiff that the mortgage is a statutory mortgage. This cannot be true in the sense that the act of December 19, 1866, of itself constituted a mortgage. There is not one word in the act to justify such contention. It can only be true to the extent that by virtue of the statute authority is conferred upon certain agents of the State to execute "a deed of mortgage."

"A statutory lien can exist only when the statute in terms not doubtful expresses the intention to give a lien."

Jones on R. R., sec. 79.

Cincinnati City *v.* Morgan, 3 Wall., 275.

In Tompkins *v.* Fort Smith Railway, 125 U. S., at page 127, the court discussing the question of a statutory mortgage or lien said:

"There was a plain simple way in which such a lien could be created, and that was by providing in express terms for it."

Before considering the mortgage or mortgages to foreclose which this suit was commenced I think it important to call attention to the pledge of the State made by the act of February 14, 1855 (Record, p. 149), authorizing the public treasurer to subscribe, on behalf of the State, for 10,000 additional shares of stock in the North Carolina Railroad Company. By section 1 of that act these additional shares were to be paid for "by issuing and making sale of the bonds of the State, under the same provisions, regulations and restrictions, prescribed for the sale of the bonds heretofore issued and sold to pay the State's *original* subscription in the stock of said company; and the same pledges and securities are hereby given for the faithful payment and redemption of the certificates of debt now authorized, that were given for those issued under the direction of said act: *Provided, nevertheless,* That the whole amount of principal money of such bonds or certificates of debt, shall not exceed the sum of one million of dollars."

By this is meant that the provisions, &c., for issuing and selling the bonds under this, should be the same as under the former act, as much so as if said provisions, &c., were actually contained in it, without any reference to the former act whatever; and the pledge of the 10,000 additional shares was to be a security for the bonds issued to pay for them, provided the whole amount of these bonds did not exceed the sum of one million of dollars. The words "and the same pledges and securities are hereby given" did not mean that the same stock pledged to secure the bonds issued under the act of 1849 should be pledged to secure the bonds issued under the act of 1855, nor did they mean that the additional 10,000 shares should be subjected to a lien for the

bonds issued under the act of 1849. So, of the State's 30,000 shares, the "additional" 10,000 subscribed for under the act of 1855 is clearly exempt from any lien in favor of the plaintiff or other holders of the so-called second-mortgage bonds.

There are then but two classes of debts of the State: 1. The certificates issued prior to 1855 to pay for the State's common stock. 2. The bonds issued under the act of 1855 to pay for the State's preferred stock. The first class was a first lien upon the common stock; the second class was a first lien upon the preferred stock.

These two classes of debts have been renewed in pursuance of chapter 138, Laws 1879 (Record, p. 129). By section 8 of that act the new bonds "shall in all respects, stand in the place of and be entitled to the same securities as are the old bonds and coupons aforesaid, and shall have the same lien on the stock of the State in the said railroad company which the said old bonds and coupons *now* have."

In the renewal the old certificates were taken up with new bonds, and the bonds issued under the act of 1855 were taken up with new bonds. To carry out the act of 1879, just cited, these two classes of debts ought to have been kept separate, but judging from a copy of the bond produced by defendant Rothschild, who has been brought into this suit ostensibly to represent the holders of the first-mortgage bonds, they were not. The copy of the bond will be found in the Record, page 77. The recital in it is as follows:

"This bond is in renewal of one of a series issued under acts ratified Jan. 27th, 1849, December 22nd and 25th, 1852, and February 14th, 1855, for the construction of the North Carolina railroad, * * * and is entitled to the

same lien on the State's stock in the North Carolina Railroad Company to which the old bond for which this was given in renewal was entitled."

If I am correct in the construction I have given the act of 1855, as regards the lien or pledge given by that statute, there is no evidence that Rothschild's bonds belong to the class entitled to a first lien upon the State's common stock. The debts constituting such first lien were evidenced by certificates, while the debts created under the act of 1855 were evidenced by coupon bonds. Rothschild, it would seem from his evidence (Record, near foot of page 58), held an old bond and received a new one in the place of it, under the act of 1879. This is some evidence that the bonds he surrendered, when he received the new ones, were of the class constituting a first lien on the 10,000 shares of the State's preferred stock, and, as I have shown, the so-called second-mortgage bondholders have no lien upon the preferred stock.

In all cases where one of a class is permitted to maintain a bill in equity on behalf of himself and all others of the class, care should be taken that such person fairly represents the interests or rights involved, so that they may be fully and honestly tried.

United States *v.* Old Settlers, 148 U. S., 480.

Rothschild, while ostensibly a defendant, is substantially a plaintiff, and permits the bill to be taken against him *pro confesso.*

THE DEED OF MORTGAGE.

If there were no bonds duly executed and duly issued there could be no deed of mortgage; for there was no authorization or direction to execute one except as a part of a valid bond.

The act of December 19, 1866, authorized and directed the public treasurer, whenever it became his duty under the provisions of acts passed at the sessions of 1854–'55 and 1860–'61, to issue bonds * * * to the amount of $50,000 or more, to mortgage an equal amount of stock * * * as collateral security for the payment of said bonds, and to execute and deliver, with each several bonds, a deed of mortgage for an equal amount of stock, to be a part of the bond.

The intention of the legislature probably was, that whenever it became the duty of the treasurer to issue bonds, under the acts mentioned, he should execute a deed of mortgage for an amount of stock equal to the amount of bonds to be issued at any one time, and that an original of this deed of mortgage should be delivered with each bond of that issue.

The issue of bonds could not be less than fifty of one thousand dollars each, but might be more. There would have been no difficulty in preparing a deed of mortgage upon each bond, or upon a paper separate from the bond, covering an amount of stock equal to the amount of all the bonds to be issued at any one time, and expressing upon the face of the mortgage that it was issued under the act of 1866 to secure the whole amount of the bonds of the par-

ticular issue, and that a like mortgage accompanied each of the other bonds, and that all of the said mortgages constituted but one mortgage. The object of requiring that this mortgage should accompany each bond, as a part of it, was, as said in the preamble of the act of 1866, to enhance the value of the bonds. It would have been better if the statute had provided for the registration of a single mortgage and a recital on each bond that such mortgage had been executed and registered.

But the public treasurer thought that the statute authorized and directed him to make a separate deed of mortgage for each bond for a number of shares of stock equal to the amount of said bond, and gave the result of his construction of the statute in the paper claimed by the plaintiff to be a deed of mortgage, to wit:

"Ten shares of the stock in the North Carolina Railroad Company originally subscribed for by the State are hereby mortgaged as collateral security for the payment of this bond."

If this constituted a valid deed of mortgage, under the statute, its effect was to convey to the bearer of the bond the legal title to and to make him the legal owner of ten shares of stock, and to give him the right to call upon the North Carolina Railroad Company for a certificate of that number of shares, or for a separate certificate for each of the ten shares, and to entitle him to all the rights and privileges of a stockholder in the company. There was nothing in the statute or in the mortgage to show that the mortgagee was not to have the possession of the stock, with all the rights of a legal owner in the company. The mortgagee under his

mortgage could have applied to the railroad company for the certificates of stock, and, if he had been refused, could have applied to a court in an action against the company to compel the issuing of the certificates. In a case where a purchaser of stock in the Western North Carolina Railroad Company, at a sale under an attachment, was refused certificates by the company and sued to compel the company to issue the certificates the supreme court of North Carolina held he was entitled to relief.

Morehead *v.* Railroad, 96 N. C., 362.

The language of the statute and the mortgage that the stock shall be a collateral security implies that the holder of the bond was to have possession of the stock.

Burgess *v.* Selligman, 107 U. S., 20.

Jones in his work on Chattel Mortgages, section 1, says:

"A mortgage of personal property is like a mortgage of real estate under the old common law, but differs widely from a mortgage of real estate, as the latter is viewed under the latest doctrine which has been adopted in nearly half of the States and Territories of the United States; for while in these States such a mortgage is regarded as conferring no legal title upon the mortgagee, but as being a mere lien or security, in these same States almost without exception, and everywhere else, a mortgage of personal property is regarded as not being a mere security, but as passing the legal title which becomes absolute in the mortgagee upon default."

If this be the correct exposition of the law it should seem that the plaintiff, if his mortgages are of any value whatever, has become the absolute owner of one hundred shares

of the stock originally subscribed for by the State, and is entitled to all the rights of a stockholder in the company to the extent of the amount of its stock, and has no need to call upon this court for any relief whatever.

In Casey *v.* Cavaroc, 96 U. S., 477, it is said :

"When, * * * the title has been transferred to the creditor * * * the character of the security is not affected at the common law by the debtor having actual possession of the collateral. In such case, they are held by the creditor by way of mortgage as well as pledge ; and a mortgage is valid notwithstanding the mortgagor has the possession. The difference ordinarily recognized between a mortgage and a pledge is, that title is transferred by the former and possession by the latter. * * * The possession need not be actual: it may be constructive ; as where * * * a bill of lading is assigned, in such case, the act done will be considered as a token, standing for actual delivery of the goods. It puts the property under the power and control of the creditor. In some cases, such constructive delivery cannot be effected without doing what amounts to a transfer of the property also. The assignment of a bill of lading is of that kind. Such an assignment is necessary, where a pledge is proposed, in order to give the constructive possession required to constitute a pledge ; and yet it formally transfers the title also. In such a case, there is a union of two distinct forms of security—that of mortgage and that of pledge ; mortgage by virtue of the title, and pledge by virtue of the possession.

"This advantage exists when notes and bills are transferred to a creditor by way of collateral security. His possession of them gives them the character of a pledge. Their endorsement if payable to order, or their delivery if payable to bearer, gives him the title also, which is something more than a pledge. This double title existed in White *v.* Platt

and in Clarke *v.* Iselin. Hence, the actual possession of the securities by the creditor was a matter of less importance in those cases."

Unquestionably, if the mortgage, in the case at bar, was of any validity whatever, it conveyed the legal title of the ten shares of stock to the bearer of the bond, and, as the stock (not the mortgage) was to be the collateral security for the payment of the bond, the possession was transferred to the bearer as much as it was possible for the stock in its then condition to be transferred.

In section 4 of the charter it was provided:

"That all subscriptions of stock should be in shares of one hundred dollars, the subscriber paying at the time of making such subscription $5 on each share thus subscribed."

Record, p. 138.

Now, as I have said, the mortgage had the effect, if it had any effect, when executed and delivered, to convey not only the title to, but the possession of, the stock, because the title and possession were inseparable in the stock's then condition. But I insist the mortgage was not authorized by the statute and was invalid. Many definitions have been given of stock and shares of stock.

Capital stock has been defined as "the sum fixed by the corporate charter as the amount paid in or to be paid in by the stockholders for the prosecution of the business of the corporation and for the benefit of corporate creditors."

1 Elliott on R. R., sec. 76, citing 1 Cook on Stockholders, sec. 9.

The term capital stock is often used to embrace all the property or capital of the corporation.

"Shares of stock (unless declared by statute to be real estate) are personal property, and are subject to purchase and sale by natural persons as other personal property, and the right of the shareholder to sell and transfer his stock cannot be restrained by a by-law of the corporation."

1 Elliott on R. R., sec. 92.

The possession of stock not divided into shares or not evidenced by certificates it should seem would be inseparable from the legal title. It can be counted only so much of the capital stock, and when it means anything else it cannot refer to anything else than the interest of the shareholders or individuals (23 N. Y., 192, 220; Bailey *v.* R. R. Co., 22 Wall., 604, 637).

"The term 'stock' has been used at times to indicate the same thing as capital stock. Generally, however, it means shares of stock."

1 Cook on Cor., sec. 8.

"A share of stock may be defined as a right which its owner has in the management, profits and ultimate assets of the corporation."

Ib., sec. 12.

"The interest of each stockholder consists in the right to a proportionate part of the profits whenever dividends are declared by the corporation during its existence under its charter, and to a like proportion of the property remaining, upon the termination or dissolution of the corporation, after payment of its debts."

Gibbons *v.* Mahon, 136 U. S., 549.

"A share of stock is an incorporeal intangible thing. It is a right to a certain proportion of the capital stock of a corporation—never realized except upon the dissolution and winding up of the corporation—with the right to receive, in the meantime, such profits as may be made and declared in the shape of dividends."

Neiler *v.* Kelley, 69 Pa. St., 403, 407.

From these authorities it is indisputable that a share of stock is a right to a certain thing or things. Now this right is what the statute authorized and directed to be mortgaged if the public treasurer put the proper construction upon it. How is it possible for one to have the legal title to a *right* without having the possession of that *right?* May he not be in possession of a right and yet not in the enjoyment of what the right entitles him to?

Cook on Corporations (vol. 2, sec. 464) says:

"Shares of stock may be the subject of a mortgage or pledge. A mortgage of stock, however, is not often made; and, unless there is a clear intent to the contrary, the courts will treat the transaction as a pledge rather than a mortgage. In fact it is difficult to ascertain from the cases how shares of stock may be mortgaged; and a few early decisions, which held certain transactions to be mortgages, would to-day be held to be pledges. There are but few clear cases of a mortgage of stock to be found. It seems that a formal instrument of chattel mortgage of stock, duly executed and registered, * * * would not constitute an effectual mortgage of stock, and the mortgagee would not be protected where he does not receive the certificate of stock from the mortgagor, or does not obtain a registry of transfer on the corporate books."

This author then cites in a note a case from Kentucky, and says:

"The clearest and most satisfactory case is Spalding *v.* Paine, 81 Ky., 1, 416 (1883), where a chattel mortgage of a share of stock was duly recorded in the proper county, the mortgagor retaining the certificate of stock. The mortgagor subsequently sold and transferred the certificate of stock to a *bona fide* purchaser. The court held that the recording of the mortgage was of no avail, that there could be no mortgage of choses in action, and that the *bona fide* transferee took the stock."

Of course the answer to this will be that the statute authorized the mortgage, but I contend that the statute authorized more than the mortgage—that it authorized a pledge as well, and that this is clearly implied from the words "as collateral security for the payment of this bond." I understand that it was not the mortgage that was to constitute the collateral security, but the thing mortgaged—the ten shares of stock. The clear purpose was to convey to the mortgagee both title and possession, and I am strengthened in this view by the well-settled rule in this State in regard to mortgages of personal property.

In Doak *v.* Bank of the State, 28 N. C. (6 Ir. Law), top of page 319, it is said:

"A mortgage of personal property in law differs from a pledge; the former is a conditional transfer or conveyance of the property itself; and if the condition is not duly performed, the whole title vests absolutely at law in the mortgagee, exactly as it does in a mortgage of lands; the latter, a pledge, only passes the possession, or at most is a special property in the pledge, with the right of retainer until the debt is paid. A mortgage is a pledge and more, for it is an

absolute pledge, to become an absolute interest, if not redeemed in a certain time. A pledge is a deposit of personal effects, not to be taken back but on payment of a certain sum, by express stipulation, to be a lien upon it. Generally speaking, a bill in equity to redeem will not lie on behalf of a pledgor or his representatives, as his remedy is at law, upon a tender of the money."

Chief Justice Ruffin, in the case just cited, speaking of "stock and choses in action generally," says:

"They are not goods or chattels, and as such subject to a *fieri* or *levari facias;* and there is no instance, that I am aware of, except one, in England, in which the court of equity has laid hold of them for the satisfaction of judgments—for they are not equitable property, but are legal rights. * * * Being in their nature legal rights, equity leaves it to the law to dispose of them; and no method has as yet been provided for that purpose, but that of taking execution against the body, and thereby inducing the owner to pass them by his contract in satisfaction of the particular debt, or to surrender them as a bankrupt or insolvent for the benefit of all his creditors. The court of equity deems that an adequate remedy, and therefore sees no necessity for coming in aid of the law."

The Chief Justice then shows that the English case to which he referred made an exception on account of the insolvent debtors' act, the benefit of which the defendant in the case had taken, and thereby became protected against *ca. sa.*, but by the act of Parliament his future effects were liable for the debt. He then goes on to say that even that case had been questioned by very high authority—that of the court of exchequer—in Otley *v.* Lines, 7 Price, 274.

From what I have said, I insist that, if the plaintiff has any rights at all under his mortgage, they are as perfect and complete as any decree of this court could possibly make them. But I do not wish to be understood as conceding that the mortgage is of any effect whatever. If it should become the purchaser of stock at a sale under a decree of this court, it could acquire no greater right than it now has, for it now has the right to demand certificates from the company and to be recognized as a stockholder entitled to receive dividends. If these rights should be refused it may sue the company in the circuit court of the United States or in this court to compel it to issue the certificates and to pay over the dividends.

No controversy had arisen between the plaintiff and defendant State at the date of the commencement of this suit.

The mere fact that the plaintiff held the ten bonds sued upon, and that the said bonds were past due and unpaid, did not constitute a controversy *per se*.

In Louisiana *v.* Texas, 176 U. S., 18, it is said:

"In order that a controversy may arise between two States, there must be a direct issue between them, and the subject-matter must be susceptible of judicial solution, and it is difficult to conceive of a direct issue between two States in respect of a matter where no effort at accommodation has been made."

And in Missouri *v.* Illinois, 180 U. S., 208, 219, Justice Shiras, delivering the opinion of the court, used the following language:

"As there is no definition or description contained in the Constitution of the kind and nature of the controversies that should or might arise under these provisions, it might be supposed that, *in all cases wherein one State should institute legal proceedings against another, the original jurisdiction of this court would attach.*

"But in this, as in other instances, when called upon to construe and apply a provision of the Constitution of the United States, we must look not merely to its language but to its historical origin, and to those decisions of this court in which its meaning and the scope of its operation have received deliberate consideration."

He then takes up a large number of cases showing what controversies are justiciable, and when they arise under the Constitution, and quotes the language I have quoted from the case of Louisiana *v.* Texas, *supra.*

And the Chief Justice and the two Associate Justices, who joined with him in the dissenting opinion in the case of Missouri *v.* Illinois, *supra*, say:

"Controversies between the States of the Union are made justiciable by the Constitution because other modes of determining them were surrendered; and before that jurisdiction, which is intended to supply the place of the means usually resorted to by independent sovereignties to terminate their differences can be invoked, it must appear that the States are in direct *antagonism as States.* Clearly this bill makes out no such state of case."

And I may insist that the bill in the case at bar "makes out no such state of case;" and I also insist that if what has occurred since the filing of the bill would be sufficient to constitute such controversy, yet it did not exist at the time the suit was commenced.

The defendant State at that time did not so much as know that the plaintiff held any bonds purporting to be its bonds. The governor of North Carolina was examined as a witness and testified that the first intimation he had that the plaintiff had bonds was what he saw in a newspaper account of an application of the plaintiff to this court for leave to file the bill.

If it be answered that a controversy had arisen and was in existence at the time the plaintiff acquired the bonds, the reply is that such controversy was not one upon which a suit might have been maintained in a court of justice, was not assignable, and could not be availed of by the plaintiff.

II.

But if a controversy did exist at the date of the commencement of the suit, the pleadings and evidence disclosed a condition of things which ought to prevent this court from entertaining jurisdiction of it in this suit.

1. The suit is brought not for the plaintiff State alone, but for a class, and the bill contains all the averments that would have been necessary if all the holders of the class of bonds on which this suit is based had been made plaintiffs.

The defendant Salter is made a defendant to avoid this situation, but he is in all respects substantially a plaintiff, and his answer for himself and the class in which he belongs contains substantially a repetition of the averments of the bill. He is but a defendant in form.

"The original jurisdiction of the Supreme Court of the United States depends solely on the character of the parties, and is confined to the cases in which are those enumerated parties, and those only."

Louisiana *v.* Texas, 176 U. S., 1, 16, near top of page.

2. The donation of the ten bonds sued upon was not to the State as a State, but to the State as a trustee for some charitable institution of the State to be selected by the State legislature. The precatory words with which the donation was accompanied was sufficient to raise an implied trust, and the declaration of the trust was sufficiently definite.

Miller *v.* Atkinson, 63 N. C., p. 537.

1 Perry on Trusts, sec. 112 *et seq.*

This, it would seem, would bring the case within another rule laid down in Louisiana *v.* Texas, *supra*, that the suit must be one between States as States, and not between a State acting as trustee, as plaintiff, and another State.

In the case at bar the plaintiff does not "present herself in the attitude of *parens patriæ*, trustee, guardian, or representative of all her citizens."

3. The ten bonds sued upon were not donated to the plaintiff State, but constituted the consideration for a contract between it and the holders of the so-called second-mortgage bonds, whereby the plaintiff State engaged to institute a suit in the Supreme Court of the United States for the benefit of all the holders of said classes of bonds; and this brings the case within the rule of New Hampshire *v.* Louisiana, 108 U. S., 76, 85, 91:

"Where a citizen could not maintain an action if the matter or controversy were between him and the State he will

not be permitted to use the name of the State and seek relief in the Supreme Court."

In The United States *v.* Beaufort, 3 Pet., 12, 30, it is said:

"It can require no argument to show that the transfer of any claim to the United States cannot give to it any greater validity than it possessed in the hands of the assignor."

This language was used by the court with reference to the right to enforce the cause of action sued upon in a court of justice.

See also United States *v.* Nashville, etc., R. R. Co., 118 U. S., 125.

4. The transaction between the plaintiff State and Schaffer, who represented the so-called second-mortgage bondholders, was against public policy, as being an attempt to control "the regular administration of justice."

This court in Tool Company *v.* Norris, 2 Wall., —, speaking of agreements against public policy, said:

"It is unnecessary to state them particularly; it is sufficient to observe, generally, that all agreements for pecuniary consideration to control the business operations of the Government, or the regular administration of justice * * * are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes the doors to temptation, by refusing them recognition in any of the courts of the country."

This language was repeated by the court in McMullen *v.* Hoffman, 174 U. S., 648, in which case the doctrine of con-

tracts against public policy is very fully discussed, and it is there said:

"The law looks to the general tendency of such contracts. The vice is in the nature of the contract, and it is condemned as belonging to a class which the law will not tolerate."

It may be conceded that "if the State had the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into," and "if the act of an individual is within the terms of the law, whatever may be the reason which governs him, or whatever may be the result, it cannot be impeached" (Doyle *v.* Insurance Co., 94 U. S., 541). But the defendant in the case at bar says that the court will look at the facts and legitimate inferences from them to ascertain what the constitutive or ultimate facts are, and in this case the defendant insists that the pleadings and evidence clearly establish that the plaintiff State and the so-called second-mortgage bondholders entered into a conspiracy to acquire a jurisdiction in this court of a suit, not for the State of South Dakota, but for the said second-mortgage bondholders as a class.

The conduct of the plaintiff State and its associates, who are in substance plaintiffs, but in form defendants, has been such as to justify this court in refusing to entertain jurisdiction or to grant any relief, upon the principles announced by this court in the case of The Pope Mfg. Co. *v.* Ghormally, 144 U. S., 224, 233–237.

This bill may be considered one for specific performance to the extent that this court is asked to make the mortgage one "*in solido*," etc.

This court can look into all that was said and done by the plaintiff and its associates in their negotiations to secure a standing in this court. If the letter written by Schaffer to Mr. Burke is to be regarded as containing the terms of the so-called gift to the plaintiff, still the court can look into all that was said and done, whether contained in this letter or not.

Ward *v.* United States, 14 Wall., 28.
Merriam *v.* United States, 107 U. S., 437.
United States *v.* Gibbons, 109 U. S., 200.

The so-called mortgage is too indefinite for any purpose. It is like the mortgage of "ten new buggies," executed by a buggy-maker, who had on hand at the time more than ten new buggies, none of which was delivered to the mortgagee. The supreme court of North Carolina held this mortgage to be void for uncertainty, or rather that it did not pass the title to any particular new buggies.

Blakeley *v.* Patrick, 67 N. C., p. 40.

But if the mortgage can be regarded at all, then the bond which is annexed as a part can be used only as a means of ascertaining the *pro rata* share of each holder of the bonds in the proceeds of the sale of the stock.

The transfer of the ten bonds to South Dakota was only a transfer at best of an interest in the mortgage, and the relation of South Dakota to the other holders of the bonds brings the case within the decision of this court in Farmington *v.* Pillsbury, 114 U. S., 138. In that case certain citizens of the State of Maine transferred coupons to a citizen of Massachusetts under an arrangement by which "the

plaintiff gave to the agent of the holders of the coupons his note for $500, and agreed, as a further consideration, that if he succeeded in collecting the full amount of the coupons he would pay the agent fifty per cent. of the net amount collected above $500." It was held that this suit was for the benefit of the owners of the bonds, and was their own in reality, though they had agreed that the plaintiff might retain one-half of what he collected for the use of his name and the trouble in collecting it. The court said:

"It is true the transaction is called a purchase in the papers that were executed, and that the plaintiff gave his note for $500, but the time for payment was put off two years, when it was, no doubt, supposed the result of the suit would be known. * * * In the language of Mr. Justice Field, speaking for the court in Detroit *v.* Dean, 106 U. S., 537, 541, applied to facts of this case, the transfer of coupons was 'a mere contrivance, a pretense, the result of a collusive arrangement to create' in favor of this plaintiff 'a fictitious ground of Federal jurisdiction,' so as to get a re-examination in that jurisdiction of the question decided adversely to the owners of the coupons by the highest judicial tribunal of the State."

Will it be pretended that the counsel for the "class" represented by Salter is here to defend?

The plaintiff State was placed in possession of ten bonds under a contract for the use of its name as plaintiff in a suit which it was believed would enure to the benefit of all holders of bonds of the same class. The evidence establishes this beyond doubt. If States are to be subjected to the same rule in respect of jurisdiction as individuals, this suit cannot be maintained. The case of Blacklock *v.* Small, 127 U. S., 96,

104, where a defendant in name and form was substantially a plaintiff, and by her answer ranged herself on the side of the plaintiffs as against her codefendant, Small, and joined in the prayer of the bill, and asked that payment of the bond and the satisfaction of the mortgage be declared void, &c., the court held that the suit was thereby shown to be substantially one by and for the benefit of this answering defendant, and as she was a citizen of South Carolina as well as her codefendant, Small, the court had no jurisdiction. In Pacific R. R. *v.* Ketchum, 101 U. S., middle of page 299, it is said:

"Although nominally defendants according to the pleadings, they voluntarily, in the course of the proceedings, arrange themselves on the same side of the subject-matter of the action with the complainants. This they had the legal right to do. After that, clearly the *controversy* was between citizens of one or more States on one side and citizens of other States on the other side, and when the decree was rendered the only thing to be done was to foreclose the mortgage sued on, as between the trustees of the mortgage acting with their beneficiaries and the railroad."

In the case at bar Rothschild and Salter, professing to represent all the holders, of the same class of bonds claimed by the plaintiff, have voluntarily and without objection on the part of the plaintiff, arranged themselves on the same side of the subject-matter of the suit with the plaintiff.

Now if the same rule applies in a case where one State sues another in this court as applied in Blacklock *v.* Small, the plaintiff having voluntarily associated itself with individuals on the same side of the controversy will have to submit to have its bill dismissed.

If the scheme of the bondholders was to have the plaintiff bring suit in this court, and the ten bonds were turned over to the plaintiff for such purpose, it was a fraud upon the law, upon the jurisdiction of this court, and upon the rights of the defendant. And I insist that even if the plaintiff was innocent of any knowledge of such purpose, inasmuch as she was a mere volunteer, paying nothing for the bonds, she will not be permitted to avail herself of the fraud of her donor.

"No one can be permitted to set up a benefit derived through the fraud of another, although he may not have had a personal agency in the imposition" (Black *v.* Bayless, 86 N. C., foot of p. 534).

It is not even disguised that the purpose of the bondholders was to bring about the exact state of things we have here now, and the rule we have just stated is applicable.

But the plaintiff knew all about the matter, and it was through her counsel that the scheme was originated, and she is charged with whatever knowledge he is possessed of, and with whatever knowledge any of her attorneys possessed.

"Information to an attorney is information to his client; and the latter is affected with notice of all facts notice of which can be charged upon his attorney" (Smith *v.* Ayer, 101 U. S., 320; May *v.* Le Claire, 11 Wall., 217).

It is insisted by the plaintiff's counsel that the motive of the bondholders does not concern defendant. In this case we utterly deny that any such rule applies. They say that no one has any interest in the ten bonds except the plaintiff.

This we also deny, and insist that the evidence shows that the ten bonds and all others of the same class constitute but one controversy, and that the bondholders, other than the plaintiff, are so much interested in the ten bonds claimed by the plaintiff, that the only hope they have in the world of ever realizing anything upon their own bonds is based upon the result of the plaintiff's effort here to collect the bonds sued upon. The interest of the other bondholders in the ten bonds is vital. It will not do to say that merely because the other bondholders will not be entitled to receive any of the money that may be collected on the ten bonds, they have no interest in them, for that would be to contradict the whole theory of this suit. The true spirit and far-reaching effect of the eleventh amendment is not only to prevent an individual from suing a State, but also to prevent him from entering into any scheme by which he can realize only just what he would realize if he were able to sue himself.

III.

The cause of action alleged in the bill of complaint, if it can be called a controversy between the plaintiff and defendant State, is not susceptible of litigation in any court of justice—in other words, it is not justiciable.

It was held in Chisholm *v.* Georgia, — U. S., —, that a State might be sued in the Supreme Court of the United States in assumpsit by a citizen of another State, but this decision was reversed by the *eleventh amendment* to the Constitution.

It has been uniformly held by this court that "those who deal in the bonds and obligations of a sovereign State are aware that they must rely *altogether* on the sense of justice and good faith of the State" (Bank of Washington *v.* Arkansas, 20 How., 530, 532).

Plaintiff's counsel cite the case of Cohen *v.* Virginia, 6 Wheat., 406–'7, to show that the "motive for the adoption of the 11th amendment was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation." This court has in a much later case said just the contrary.

In *In re* Eyers, 123 U. S., foot of p. 504, Mr. Justice Matthews said:

"It cannot be doubted that the 11th amendment to the Constitution operates to create an important distinction between contracts of a State with individuals and contracts between individual parties. In the case of contracts between individuals, the remedies for the enforcement or breach, in existence at the time they were entered into, are a part of the agreement itself, and constitute a substantial part of its obligation (Louisiana *v.* New Orleans, 102 U. S., 203). That obligation, by virtue of the provision of article I, § 10, of the Constitution of the United States, cannot be impaired by any subsequent State legislation. Thus, not only the covenants and conditions of the contract are preserved, but also the substance of the original remedies for its enforcement. It is different with contracts between individuals and a State. In respect to these, by virtue of the 11th amendment to the Constitution, there being no remedy by a suit against the State, the contract is substantially without sanction, except that which arises out of the honor and good faith of the State itself, and these are not subject to coercion. Although the State may, at the inception of the contract, have con-

sented as one of its conditions to subject itself to suit, it may subsequently withdraw that consent and resume its original immunity, without any violation of the obligation of its contract in the constitutional sense (Beers *v.* Arkansas, 20 How., 527; Railroad Co. *v.* Tennessee, 101 U. S., 337). The very object and purpose of the 11th amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several States of the Union, invested with the large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, where citizens of other States or aliens, or that the course of their public policy and administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the 11th amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held, not only suits brought against a State by name, but those also against its officers, agents and representatives, where the State, though not named as such is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates."

In Railroad Co. *v.* Tennessee, 101 U. S., foot of p. 339, Chief Justice Waite said:

"Mere judicial inquiry into the rights of parties is not enough. There must be the power to enforce the results of such an inquiry before there can be said to be a remedy which the Constitution deems part of a contract. Inquiry

is one thing; remedy another. Adjudication is of no value as a remedy unless enforcement follows. It is of no practical importance that a right has been established if the right is no more available afterwards than before. The Constitution preserves only such remedies as are required to enforce a contract."

This whole doctrine is very fully discussed in Hans *v.* Louisiana, 134 U. S., 1, 13, 14, *et seq.*

Justice Bradley, in delivering the opinion of the court in this case, said:

"Looking at the subject as Hamilton did, and as Mr. Justice Iredell did, in the light of history and experience and the established order of things, the views of the latter were clearly right,—as the people of the United States in their sovereign capacity subsequently decided."

Smith *v.* Reevis, 178 U. S., 446, approves the case just cited, and reiterates what was there said in regard to the suability of a State.

Now, if this was the law, it became a part of the contract between the defendant State and the holder of any of the bonds of the class sued upon that the obligation of the defendant was only upon its conscience, and that the holder had nothing to rely upon except the obligation of *good faith.*

In Edwards *v.* Kersey, 96 U. S., top of p. 601, it is said:

"It is also the settled doctrine of this court that the laws which subsist at the time and place of making the contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms."

Now, suppose each of the bonds sued on in this case had "incorporated in its terms" that the State should have the privilege of paying in its own way "free from every constraint but that which flows from the obligations of good faith," could it be contended that any court could take jurisdiction of a suit based upon such bonds?

The obligation of a contract has been defined to be "the law which binds the parties to perform their agreements" (Walker *v.* Whitehead, 16 Wall., 318).

"By the obligation of a contract is meant the means which, at the time of its creation, the law affords for its enforcement" (Nelson *v.* St. Martin's Parish, 101 U. S., foot of p. 720).

"The obligation of a contract is the means provided by law by which it can be enforced,—by which the parties can be obliged to perform it" (Louisiana *v.* New Orleans, 102 U. S., foot of p. 206).

What has been said applies with the same force to the mortgage as to the bonds. Indeed, the mortgage by express provision is made a part of the bonds. Besides, it would be an anomaly if the mortgage could be enforced by a court without jurisdiction to decide whether the bond it was given to secure was valid or invalid. This would be in effect the case of South Dakota *v.* Ten Shares of Stock. *Reductio ad absurdum.*

If the plaintiff had no right to come into this court and ask to have a judgment or decree of the court for the bonds, whence comes the jurisdiction to foreclose the mortgage?

True it is that none of the holders of the so-called second-mortgage bonds prior to the donation to the plaintiff State

could have maintained an action or a suit to recover the same or to foreclose the mortgage; but this was not because there was no court for them to go into, but because it was a part of the contract between them and the State of North Carolina that no obligation except that of good faith was imposed upon the State of North Carolina by the contract, and that it had the right and privilege of paying in its own way, "free from every restraint but that which flows from the obligations of good faith."

Contracts between a nation and an individual are only binding on the conscience of the sovereign and have no pretension to a compulsive force. They confer no right of action independent of the sovereign will.

In Wisconsin *v.* Pelican Ins. Co., 127 U. S., foot of p. 288, it is said:

"This court has declined to take jurisdiction of suits between States to *compel the performance of obligations*, which, if the States had been independent nations, could not have been enforced judicially, but only through the political departments of their government."

If this be the law it will end this case, for I take it no one will contend that if the plaintiff State and defendant State were independent nations, not in any way connected with the United States—not subject to the suzerainty of any other nation—and one held a debt against the other which the other would not pay, it would constitute a justiciable controversy.

It is not the mere personal disability of an individual holding bonds of a State that prevents his suing to recover them. The infirmity is in the very subject-matter of the

action. The imperfection is in the obligation, and this imperfection follows it into whosesoever hands it may come, be he individual or State.

I know "it is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."

JAMES H. MERRIMON,
Counsel for Defendant, The State of North Carolina.

IN THE SUPREME COURT OF THE UNITED STATES,

IN EQUITY.

THE STATE OF SOUTH DAKOTA, *Complainant*,

vs.

THE STATE OF NORTH CAROLINA *et al.*

MOTION.

And now, on the —— day of May, 1904, comes the State of North Carolina, through its attornies, and moves the Court that time be extended in which to present a petition to re-hear in the above entitled suit until the next term of this Court or such other time as the Court may prescribe.

R. D. GILMER,
Attorney-General.
JAMES E. SHEPHERD,
JAMES H. MERRIMON,
GEORGE ROUNTREE,
Counsel for North Carolina.

FILE COPY.

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JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

No. 8 ORIGINAL.
DECIDED OCTOBER TERM, 1903.

SOUTH DAKOTA,
Plaintiff,

against

NORTH CAROLINA,
Defendant.

PETITION FOR REHEARING.

J. G. CARLISLE,
Attorney for Petitioner.

EVENING POST JOB PRINTING OFFICE, NEW YORK.

Supreme Court of the United States.

SOUTH DAKOTA, Plaintiff, AGAINST NORTH CAROLINA, Defendant.	No. 8 Original. Decided October Term, 1903.

PETITION FOR REHEARING.

On this application for a rehearing, we respectfully submit that whatever may be the rule in ordinary cases of a foreclosure by the holders of a second mortgage, the facts disclosed in this record show conclusively that the first mortgage bondholders are necessary parties to any action prosecuted for the foreclosure of the mortgage on the stock in controversy, for the reason that neither the decree which the Court has ordered to be entered, nor any other decree which the Court has the power to enter, can be executed without injuriously affecting the substantial rights of that class of creditors. In order to present the question fairly to the Court, it is necessary to show what are the relations of the three classes of bondholders to the subject matter of the suit and to the State of North Carolina.

Classified according to the character of the securities held there are:

I.—The holders of the bonds issued under the act to incorporate the North Carolina Railroad Company, ratified January 27, 1849, the 41st section of which provided:

> That as security for the redemption of said certificates of debt, the public faith of the State of North Carolina is hereby pledged to the holders thereof, and in addition thereto all the stock held by the State in "the North Carolina Railroad Company," hereby created, shall be, and the same is hereby, pledged for that purpose; and any dividends of profit which may, from time to time, be declared on the stock held by the State as aforesaid shall be applied to the payment of the interest accruing on said certificates; but until such dividends of profit may be declared, it shall be the duty of the treasurer, and he is hereby authorized and directed to pay all such interest as the same may accrue out of any moneys in the treasury not otherwise appropriated.

II.—The holders of the bonds issued under the act for the completion of the North Carolina Railroad Company, ratified February 14, 1855, under which the State made a subscription of $1,000,000 to the six per cent. preferred capital stock of that company and authorized the issue of bonds for that amount with the same pledges and securities on the preferred stock as were given in in relation to the common stock for the payment

of the bonds issued under the original act of incorporation. The first and second sections of the act are as follows:

> "SEC. 1. Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same, That the public treasurer is authorized and instructed, to subscribe in behalf of the State, for ten thousand additional shares of the capital stock in the North Carolina Railroad Company, and that he make payments for said stock, by issuing and making sale of the bonds of the State, under the same provisions, regulations and restrictions, prescribed for the sale of the bonds heretofore issued and sold to pay the State's original subscription in the stock of said company; and the same pledges and securities are hereby given for the faithful payment and redemption of the certificates of debt now authorized, that were given for those issued under the direction of said act: Provided, nevertheless, that the whole amount of principal money of such bonds or certificates of debt, shall not exceed the sum of one million of dollars.
>
> SEC. 2. Be it further enacted, That the stock thus directed to be subscribed and paid for in behalf of the State, shall be a preferred stock in the North Carolina Railroad Company, and the stock shall be entitled to six per cent. per annum, payable semi-annually thereon out of any dividends of profits made by said company, before any dividends shall be paid on any other stock in the same; and that the stockholders of said company, in general meeting assembled, shall give their assent to the provisions of this act; and that the president of said company shall make a

> certificate of said assent, under the seal of the said company, to be approved by the governor of the State, and filed in the office of the public treasurer, before the subscription shall be made as directed in the first section of this act: Provided, that said stock of one million shall continue to be preferred stock, entitled as aforesaid, only so long as, and during the time that it is held by the State; but upon being sold and transferred by the State, shall thenceforth cease to be entitled to dividends of preference as aforesaid: Provided further, that said stock may be transferred to any other work of internal improvements, by a future legislature."

III.—The holders of the bonds issued after the passage of the act enhance the value of the bonds to be issued for the completion of the Western North Carolina Railroad ratified September 18, 1866, the first section of which provides:

> "That the public treasurer be and he is hereby authorized and directed, whenever it shall become his duty under the provisions of said acts, passed at the sessions of 1854–'55 and 1860–'61, to issue bonds of the State to the amount of fifty thousand dollars, or more, to mortgage an equal amount of the stock which the State now holds in the North Carolina Railroad, as collateral security for the payment of said bonds, and to execute and deliver, with each several bond a deed of mortgage for an equal amount of stock *to* (of) said North Carolina Railroad, said Mortgage to be signed by the treasurer and countersigned by the comptroller, to constitute a part of said bond, and to be transferable in like manner with it, as provided in the charter

> of said Western North Carolina Railroad Company; and further, that such mortgage shall have all the force and effect, in law and equity, of registered mortgages without actual registry."

On the 14th day of March, 1879, an act was passed to adjust and renew a portion of the State debt which included the bonds or certificates issued for stock in the North Carolina Railroad Company. This act provided for the issue of new bonds to be exchanged for the old ones then outstanding, and the eighth section was as follows:

> "The said new bonds and coupons shall be exempt from all taxation whatsoever, State, county and municipal, general and special, and the same shall be expressed on the face thereof; and shall in all respects stand in the place of and be entitled to the same securities as are the old bonds and coupons aforesaid, and shall have the same lien on the stock of the State in the said railroad company which the said old bonds and coupons now have; and the public treasurer shall apply the dividends received by the State on its stock in said company to the payment of the coupons on said new bonds."

The Commissioners appointed under this act entered into a contract with the holders of the bonds, in which it was stipulated that the old bonds should be surrendered and new ones received in their stead; and in the sixth clause of that contract it was provided that:

> "6. And it is understood and is hereby expressly declared to be the true intent

> and meaning of this agreement that the new bonds to be issued hereunder are given, not in payment but in renewal and extension only of the old bonds, and without prejudice to the lien of the said old bonds on the State's stock in the North Carolina Railroad Company, which lien is preserved unimpaired for the security of the new bonds as fully as the old bonds are now secured thereby."

The mortgage printed on the backs of the several bonds sued on in this action states that "ten shares of the stock in the North Carolina Railroad Company originally subscribed for by the State are hereby mortgaged as collateral security for the payment of this bond" (Record, p. 3).

The foregoing extracts from the statutes, contract of adjustment and endorsement on the bonds sued on show, (1) that the holders of the bonds issued under the Act of 1849 and extended under the Act of 1879 have a first mortgage lien on the common stock and that the statute which constitutes the contract between the State and the purchasers and subsequent holders of the bonds provides, that the dividends on the stock "shall be applied to the payment of the interest accruing on said bonds;" (2) that the holders of the bonds issued under the Act of 1855 have the first and only mortgage lien on the six per cent. preferred stock and are entitled to have the dividends earned on that stock applied to the payment of accrued interest, for an act under which they purchase declares: "that the same pledges and securities are hereby given for the faithful

payment and redemption of the certificate of debts now authorized that were given for those given under the direction of said act "—that is, under the Act of 1849; and (3) that the holders of the original bonds issued under the Act of 1866, the plaintiff, being one, have a second mortgage on the common stock "originally subscribed for by the State" under the Act of 1849, but no mortgage on the preferred stock and no contract providing for the application of dividends to the payment of interest.

The clear purpose of this Legislation was to pledge the dividends on the North Carolina Railroad stock only to the holders of bonds issued to pay for subscriptions to that stock, and not to pledge the dividends on such stock to the holders of bonds issued to pay for stock in the Western North Carolina Railroad Company, to which class the plaintiff in this action belongs. The decree in this case, however, treats the bonds issued under the acts of 1849 and 1855 as belonging to the same class and as having the same security, and the plaintiff claims a second mortgage on one hundred shares of stock, being part of thirty thousand shares, without discriminating between the twenty thousand shares of common and the ten thousand shares of preferred (Record, pp. 3 and 8).

Rothschild was named as a defendant to represent part of the first mortgage bondholders upon the allegation that he was "one of the holders," but whether he held bonds secured by a lien on the common stock or on the preferred is not

stated. In his testimony, however, he shows that he owned none of the first mortgage bonds of either class, but held some bonds of the same class as those sued on (Rec. 54).

All that is said in the opinion on the subject of parties will be found on pages 112 and 113 of the official report (192 U. S.), and a reference to it will show that the right of holders of the first mortgage bonds to be heard was not discussed. The two classes of first mortgage bondholders and the second mortgage bondholders, although their relations to the subject matter of the suit were quite different, were grouped together in the statement of the question, and then it was said:

> "But we think that these individuals are "not necessary parties defendant, and "that no relief should be given to them or "to the classes of bondholders they repre-"sent."

Nothing more was said respecting the first mortgage bondholders; but the Court then proceeded to state the reasons why the holders of the second mortgages on separate and distinct shares of stock, not embraced in the plaintiff's lien, were not necessary parties. We do not claim that either the holders of the first or second mortgages could have any relief in this proceeding. This Court could not constitutionally grant them any relief against the State of North Carolina, nor could it properly grant relief to the plaintiff unless it could be done without injury to the

rights of others who are interested in the subject matter of the action, and who were not parties.

The question therefore is not whether relief can be given to the first mortgage bondholders, but whether they are interested in the subject matter of the action; and if so, whether the decree now ordered, or any other decree that this Court has jurisdiction to make, will or will not injuriously affect them.

In concluding its opinion the Court says:

> "Equity is satisfied by a decree for a "foreclosure and sale of the mortgaged "property, leaving the question of a judg- "ment over for any deficiency, to be "determined when, if ever, it arises. And "surely if, as we have often held, this "Court has jurisdiction of an action by "one State against another to recover a "tract of land, there would seem to be no "doubt of the jurisdiction of one to en- "force the delivery of personal property.
>
> "A decree will, therefore, be entered, "which, after finding the amount due on "the bonds and coupons in suit to "be twenty-seven thousand four hundred "dollars ($27,400), (no interest being re- "coverable, United States *v.* North Caro- "lina, 136 U. S., 211), and that the same are "secured by one hundred shares of the "stock of the North Carolina Railroad "Company, belonging to the State of "North Carolina, shall order that the said "State of North Carolina pay said amount "with costs of suit to the State of South "Dakota on or before the 1st Monday of "January, 1905, and that in default of such "payment an order of sale be issued to "the Marshall of this court, directing him "to sell at public auction all the interest of

> " the State of North Carolina in and to one
> " hundred shares of the capital stock of
> " the North Carolina Railroad Company,
> " such sale to be made at the east front
> " door of the Capitol Building in this city,
> " public notice to be given of such sale by
> " advertisements once a week for six weeks
> " in some daily paper published in the City
> " of Raleigh, North Carolina, and also in
> " some daily paper published in the City of
> " Washington."

The first question which presents itself on reading this order of the Court is, what stock will the Marshall sell? The order for the decree treats the matter in the same way as it was treated in the bill, by designating the thing to be sold merely as "all the interest of the State of North Carolina in and to one hundred shares of the capital stock of the North Carolina Railroad Company." This, however, if an error or oversight, can be corrected before the sale, and we call attention to it only to secure the correction in case this application for a rehearing is denied.

It is found by the Court that there has been no formal issue of stock certificates to the State (Rec., p. 309). The railroad company, which is the only authority that can issue certificates, is not a party to this action, and therefore no coercive process can be issued against it; but all the interest of the State of North Carolina must be sold, and the purchaser, we presume, armed with a title acquired under the decree of this Court, can, by appropriate proceedings in another tribunal, compel the company to issue the certificates to him;

or he can, at the very least, compel it to recognize him as a stockholder, entitled to vote at stockholders' meetings and receive dividends on his stock.

The Court says in its opinion:

> "The purchaser at the sale duly au-
> " thorized by this decree will become vested
> " with the full title of the State to the
> " number of shares of stock stated in the
> " mortgage. He will occupy the same
> " position in relation to the corporate prop-
> " erty that other stockholders occupy and
> " have whatever rights they have."

We are unable to see how such a situation can be established and maintained consistently with the rights of holders of bonds issued under the Act of 1849. They have not only a mortgage lien upon the stock representing an interest in all the corporate property, but they have under the statutes and contracts a legal and equitable right to have the dividends applied to the payment of interest as it accrues. Long before the bonds sued on were issued and sold the State of North Carolina for a full consideration had agreed to make this application of the dividends, and the bonds were sold largely upon the faith of that pledge; but now it is insisted in a judicial proceeding, to which those bondholders are not and cannot be parties, that the State of North Carolina can be deprived of the power to comply with its contract, and that the ownership and control of the stock which, of course, includes the right to receive the dividends, can be transferred to a

purchaser at a sale made for the sole benefit of a party who holds a second mortgage on the stock only, with no pledge of the dividends.

While it may be that the dividends have been at times sufficient to pay the interest on both classes of bonds and that if a court could be found with jurisdiction over all necessary parties, the holder of the second mortgage bonds might have a decree directing the surplus to be paid on his claim; but no such decree could be made in this court. In such a proceeding, the State, the first mortgage bondholders and the railroad company, which under its charter declares and pays dividends to its stockholders only, would have to be made parties, and the Court after ascertaining the relative rights of all the parties would have to determine the amount to be paid to each class of creditors. This Court has decided in the present case that all it can do in reference to the second mortgage is to order a sale of all the interest in the stock and when this is done, the purchaser will be the owner of it and the railroad company will pay him all the dividends, not merely the surplus after paying the State sufficient to discharge the interest on the first mortgage bonds. The Court can make no order of apportionment or distribution of the dividends; it must either order the sale of the stock to a purchaser who will become a stockholder and as such be entitled to all the dividends declared upon it, or it must dismiss the bill for want of jurisdiction to grant relief to the plaintiff.

This Court has frequently had occasion to decide under what circumstances relief could be given to the plaintiff in an equity case when persons having an interest in the subject matter of the action were not parties, and as most of the decisions upon the question are cited and approved in California *v.* Southern Pacific Company, 157 U. S., 229, we refer to that case for a comprehensive statement of the rules upon the subject.

In the case referred to, it is stated in the syllabus, as one of the points decided, that "When "an original case is pending in this court, to be "disposed of here in the first instance and in the "exercise of an exceptional jurisdiction, it does "not comport with the gravity and the finality "which should characterize such an adjudication, "to proceed in the absence of parties whose rights "would be in effect determined, even though "they might not be technically bound in subse-"quent litigations in some other tribunal."

In the opinion, after citing a number of decisions, the Court said: "Sitting as a court of equity "we cannot, in the light of these well-settled prin-"ciples, escape the consideration of the question "whether other persons who have an immediate "interest in resisting the demand of complainant "are not indispensable parties or, at least, so far "necessary that the cause should not go on in "their absence. Can the Court proceed to a de-"cree as between the State and the Southern "Pacific Company, and do complete and final

" justice, without affecting other persons not be-
" fore the Court, or leaving the controversy in
" such a condition that its final termination might
" be wholly inconsistent with equity and good
" conscience?" And further on it said: " Irre-
" spective, then, of the extent, technically speak-
" ing, of the effect and operation of a decree as to
" the seven parcels, based on that ground, as *res*
" *adjudicata*, it is impossible to ignore the inquiry
" whether the interests of persons not before the
" Court would be so affected and the controversy
" so left open to future litigation as would be in-
" consistent with equity and good conscience."

It is clear that, although the State of North Carolina may be at all times willing to apply the dividends upon the 100 shares of stock, which is to be sold in this action, to the payment of the interest, as it accrues on the first mortgage bonds, no such application can be made without litigation between the bondholders and the purchasers of the stock. The present litigation therefore, while it would transfer ownership and possession of the stock with the right to receive dividends upon it to a third person, will leave the rights of interested parties undetermined, and this a court of equity will not do, except perhaps under very extraordinary circumstances.

A rehearing is respectfully asked.

J. G. CARLISLE,
Attorney for Petitioner.

FILE COPY.

In the Supreme Court of the United States.

No. 8 ORIGINAL—OCTOBER TERM, 1904

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JAMES H. McKENNEY,
Clerk

THE STATE OF SOUTH DAKOTA

vs.

THE STATE OF NORTH CAROLINA et al.

This is a motion made by counsel for the State of North Carolina, asking for a modification of the decree entered in the above entitled suit at October Term, 1903, of this Court.

The following is a copy of the notice issued in the matter of this motion, service of which has been accepted by counsel for the State of South Dakota:

"IN THE SUPREME COURT OF THE UNITED STATES.

STATE OF SOUTH DAKOTA, *Complainant,*
vs.
THE STATE OF NORTH CAROLINA. } No. 9 (8) Original.

To MR. WHEELER H. PECKHAM, *Counsel for the State of South Dakota:*

You will take notice that the undersigned, of counsel for the State of North Carolina, will move in the Supreme Court of the United States, in the above entitled cause, on the first Monday in December, 1904, at 12 o'clock, noon, or as soon thereafter as counsel can be heard, for an order modifying the judgment and decree hereinbefore entered in the said cause, so as to fix the first day of April, 1905, as the date on or before which the State of North Carolina shall pay to the State of South Dakota the sum named in the said judgment and decree, instead of on or before the date named by the Court, to-wit: January 1, 1905.

This the 21st day of November, 1904.

ROBERT D. GILMER,
Attorney-General of North Carolina,
Of Counsel for the State of North Carolina."

On the said notice the following endorsement appears: "Received copy within notice November 23, 1904.

WHEELER H. PECKHAM,
Of Counsel for State of South Dakota."

At the said October Term, 1903, of this Court a decree was entered in the said cause, finding the amount due on the bonds and coupons in suit to be $27,400, and directing that the State of North Carolina should pay to the State of South Dakota the said amount, with costs of said suit, on or before the first Monday of January, 1905. And in default of such payment the Marshal of this Court was directed "to sell at public auction all the interest of the State of North Carolina in and to one hundred shares of the capital stock of the North Carolina Railroad Company."

Counsel for the State of North Carolina represents to this honorable Court that the General Assembly of the said State will meet in biennial session on the first Wednesday after the first Monday in January, 1905. The question of the payment of this judgment will be submitted to that body by His Excellency, the Governor of North Carolina. In order that action may be taken in the premises before the time fixed for the advertisement of the sale of the State's interest in certain securities mentioned in the said decree, this Court is respectfully asked to modify the said judgment and decree so as to postpone the date fixed for the payment of said amount to the first day of April, 1905.

ROBERT D. GILMER,
Attorney-General of North Carolina,
Of Counsel for State of North Carolina.

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JAMES H. McKENNEY,
Cl

United States Supreme Court.

STATE OF SOUTH DAKOTA

against

STATE OF NORTH CAROLINA.

Original. No. 8.

The defendant now moves for an order extending the time during which it shall have the right to pay the sum decreed to be due upon the bonds herein sued on, and that such time be fixed for the first Monday in April instead of being fixed for the first Monday in January, 1905, as it now is.

The effect of such enlargement of the time would be to make it so much longer before the complainant could advertise the property for sale under the decree.

The complainant objects to this for the reason that it is contrary to the practice established by the Court of Chancery in England, and by this Court.

Originally, when the foreclosure of mortgages was only by what is known as a strict foreclosure, and when the lapse of the day before which redemption might be made absolutely passed the

title to the real estate mortgaged, there was a strong tendency upon the part of Courts to give ample time to the mortgagor to pay the amount due on his mortgage and so redeem the land. Subsequently, when the practice grew up of directing a sale instead of a strict foreclosure, the form of the decree continued to direct the payment of the sum adjudged to be due by a certain day, or in default thereof, that a sale take place. While, as against strict foreclosure a somewhat liberal extension was allowed, the contrary is the rule, and perhaps it may be even stated that the rule is absolute that no extension of time will be given where the decree awards a sale. The doctrine of this Court in the respect mentioned is well settled, and will be found adjudged in the cases of Clark vs. Reyburn, 75 United States, 318, and also in the case of Chicago and Vincennes Railroad Co. vs. Fosdick, 106 U. S., 70, and cases cited. The practice is stated in considerable detail and fully in the case of Perine vs. Dunn, 4 Johnson Ch., 140; also in note to that case.

Chancellor Kent says, in the opinion in that case, "that it may be proper to observe that though six months subject to enlargement are allowed to redeem on a bill to foreclose, yet the rule and the practice apply only to cases of strict foreclosure where by the decree the equity of redemption is barred and a complete title is vested in the mortgagee. The rule does not apply to cases of decrees for the sale of mortgaged premises according to our usual practice."

The circumstances referred to by the defendant that the legislature of North Carolina is not now in session are wholly irrelevant. This decree was

rendered on the first of February last. I understand—and the gentleman on the other side will correct me if I am in error—that the legislature of the State of North Carolina was then in session, and they could have considered this matter then had they been so disposed.

If the time for the payment of the money is postponed or enlarged, inasmuch as the decree fixes the amount due, and gives no interest, the date of payment is postponed absolutely at the cost of the complainant, unless it should be provided as a condition that the defendant should pay all interest and costs.

The session of the legislature of North Carolina for this year, I understand, is to commence in January. By the terms of the decree we are compelled to give six weeks' notice of the time and place of sale. Long before the time for sale will have arrived, the legislature will have had time to act in whatsoever way it thinks best.

Further, even under strictest rules for the strict foreclosure, the time to pay was never extended except upon equitable terms. If the defendant's financial representatives should advise us of an earnest desire on their part to pay the sum decreed, and should ask for time in order to effect any particular action by the legislature, they would have no need to come to this court to ask for time. It would be a pleasure on the part of the complainant to grant whatever time was necessary for such purpose; but I have yet to hear of any tendency or desire upon the part of the defendant to pay the sum in the decree adjudged to be due, and the State of South Dakota therefore submits to this Court that

it would be unfair and inequitable to enlarge the time provided in the decree for the payment of the money even if under the settled practice in regard to foreclosures where a sale is adjudged, the Court had power to do it, especially when the defendant at any time before sale can pay the amount due and so stop the sale.

WHEELER H. PECKHAM,
R. W. STEWART,
Of Counsel for Complainant.

[5744]

Supreme Court of the United States.

No., 8 Original—October Term, 1903.

The State of South Dakota, Complainant,
vs.
The State of North Carolina, Charles Salter, and Simon Rothschilds.

[February 1, 1904.]

By an act passed in 1849, (chap. 82, Laws 1848–'49,) the North Carolina Railroad Company was chartered by the State of North Carolina with a capital of $3,000,000, divided into 30,000 shares of $100 each. The State subscribed for 20,000 shares. The statute authorized the borrowing of money to pay the State subscription and pledged as security therefor the stock of the railroad company held by the State. In 1855 a further subscription for 10,000 shares was authorized by statute, (chap. 32, Laws 1854–'55,) to be issued on the same terms and with the same security. At the same session an act was passed incorporating the Western North Carolina Railroad Company, (chap. 228, Laws 1854–'55,) which authorized a subscription by the State and the issue of bonds secured by the stock held by the State in said company. On December 15, 1866, a further act was passed (chap. 1, Laws 1866–'67,) entitled "An act to enhance the value of the bonds to be issued for the completion of the Western North Carolina Railroad, and for other purposes," which, after referring to the prior acts of the State authorizing the issue of bonds and stating that a portion of them had already been issued, added:

"And, whereas, it is manifestly the interest of the people of the whole State, that the residue of the bonds, when issued, shall command a high price in market; therefore,

Sec. 1. *Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same,* That the public treasurer be, and he is hereby, authorized and directed, whenever it shall become his duty under the provisions of said acts, passed at the sessions of 1854–'55 and 1860–'61, to issue bonds of the State to the amount of fifty thousand dollars or more, to mortgage an equal amount of the stock which the State now holds in the North Carolina Railroad, as collateral security for the payment of said bonds, and to execute and deliver, with each several bond, a deed of mortgage for an equal amount of stock to said North Carolina Railroad, said mortgage to be signed by the treasurer and countersigned by the comptroller, to constitute a part of said bond, and to be transferable in like manner with it, as provided in the charter of said Western North Carolina Railroad Company; and, further, that such mortgages shall have all the force and effect, in law and equity, of registered mortgages without actual registry."

Under this last act bonds were issued in the sum of $1,000 each, having this endorsement:

"State of North Carolina, Treasury Department,
Raleigh, July 1, 1867.

Under the provisions of an act of the general assembly of North Carolina, entitled 'An act to enhance the value of the bonds to be issued for the completion of the Western North Carolina Railroad Company, and for other purposes,' ratified 19th December, 1866, ten shares of the stock in the North Carolina Railroad Company, originally subscribed for by the State, are hereby mortgaged as collateral security for the payment of this bond.

Witness the signature of the public treasurer and seal of office, and the counter-signature of the comptroller.

KEMP P. BATTLE,
Public Treasurer.

S. W. BURGIN, *Comptroller.*"

These bonds ran thirty years and became due in 1897. In 1879 the State of North Carolina appointed commissioners to adjust and compromise the State debt, and all of the last mentioned bonds have been compromised with the exception of about $250,000. Simon Schafer and Samuel M. Schafer, either individually or as partners, owned a large proportion of these outstanding bonds, having held them for about thirty years. In 1901 Simon Shafer gave ten of these bonds to the State of South Dakota. The letter accompanying the gift was in these words:

"Office of Schafer Brothers, No. 35 Wall Street,
New York, September 10th, 1901.

Hon. Charles H. Burke.

Dear Sir: The undersigned, one of the members of the firm of Schafer Bros., has decided, after consultation with the other holders of the second-mortgage bonds issued by the State of North Carolina, to donate ten of these bonds to the State of South Dakota.

The holders of these bonds have waited for some thirty years in the hope that the State of North Carolina would realize the justice of their claims for the payment of these bonds.

The bonds are all now about due, beside, of course, the coupons, which amount to some one hundred and seventy per cent of the face of the bond.

The holders of these bonds have been advised that they cannot maintain a suit against the State of North Carolina on these bonds, but that such a suit can be maintained by a foreign State or by one of the United States.

The owners of these bonds are mostly, if not entirely, persons who liberally give charity to the needy, the deserving and the unfortunate.

These bonds can be used to great advantage by States or foreign governments; and the majority owners would prefer to use them in this way rather than take the trifle which is offered by the debtor.

If your State should succeed in collecting these bonds it would be the inclination of the owners of a majority of the total issue now outstanding to make additional donations to such governments as may be able to collect from the repudiating State, rather than accept the small pittance offered in settlement.

The donors of these ten bonds would be pleased if the legislature of South Dakota should apply the proceeds of these bonds to the State University or to some of its asylums or other charities.

Very respectfully,

SIMON SCHAFER."

Prior thereto, and on March 11, 1901, the State of South Dakota had passed the following act (Session Laws South Dakota, chap. 134, p. 227):

"An act to require the acceptance and collections of grants, devises, bequests, donations, and assignments to the State of South Dakota.

Be it enacted by the Legislature of South Dakota:

SEC. 1. That whenever any grant, devise, bequest, donation or gift or assignment of money, bonds or choses in action, or of any property, real or personal, shall be made to this State, the governor is hereby directed to receive and accept the same, so that the right and title to the same shall pass to this State; and all such bonds, notes or choses in action, or the proceeds thereof when collected, and all other property or thing of value, so received by the State as aforesaid shall be reported by the governor to the legislature, to the end that the same may be covered into the public treasury or appropriated to the State University or to the public schools, or to State charities, as may hereafter be directed by law.

SEC. 2. Whenever it shall be necessary to protect or assert the right or title of the State to any property so received or derived as aforesaid, or to collect or to reduce into possession any bond, note, bill or chose in action, the attorney general is directed to take the necessary and proper proceedings and to bring suit in the name of the State in any court of competent jurisdiction, State or Federal, and to prosecute all such suits, and is authorized to employ counsel to be associated with him in such suits or actions, who, with him, shall fully represent the State, and shall be entitled to reasonable compensation out of the recoveries and collections in such suits and actions."

This act was passed on the suggestion that perhaps a donation of bonds of Southern States would be made to the State. On November 18, 1901, the State of South Dakota, leave having been first obtained, filed in this court its bill of complaint, making defendants the State of North Carolina, Simon Rothschilds (alleged to be one of the holders and owners of the bonds originally issued by the State and secured by a pledge of the stock in the North Carolina Railroad Company under the acts of 1849 and 1855) and Charles Salter (alleged to be one of the holders of the bonds issued under the act of 1855 and 1866 on account of the the subscription to the Western North Carolina Railroad Company), the two individuals being made defendants as representatives of the classes of bondholders to which they severally belong. In it the plaintiff, after setting forth the facts in reference to the several issues of bonds and its acquisition of title to ten, prayed that an account might be taken of all the bonds issued by virtue of these statutes; that North Carolina be required to pay the amount found due on the bonds held by the plaintiff, and that in default of pay-

ment North Carolina and all persons claiming under said State might be barred and foreclosed of all equity and right of redemption in and to the thirty thousand shares of stock held by the State, and that these shares or as many thereof as might be necessary to pay off and discharge the entire mortgage indebtedness, be sold and the proceeds after payment of costs be applied in satisfaction of the bonds and coupons secured by such mortgages; and also for a receiver and an injunction.

Defendant Rothschilds made no answer. On April 2, 1902, the State of North Carolina and the defendant, Charles Salter, filed separate answers. North Carolina in its answer denied both the jurisdiction of this court and the title of the plaintiff; averred that the bonds were not issued in conformity with the statute; admitted the ownership of thirty thousand shares of stock; denied that the mortgages were properly executed or that they had the effect of conveyances or transfers either in law or equity of said stock, or conferred any lien by way of pledge or otherwise upon the the same; denied that she ever had any compact or agreement whatever other than that contained in the Constitution of the United States with South Dakota, or that South Dakota had ever informed North Carolina of any claim against her, or made any demand in respect to it, or any effort to settle or accommodate. Salter's answer was mainly an admission of the allegations of the bill with a claim that all the stock should be sold in satisfaction of the mortgage bonds of which he was charged to be the representative. Testimony was taken under direction of the court before commissioners agreed upon by the parties.

Mr. Justice BREWER delivered the opinion of the Court.

There can be no reasonable doubt of the validity of the bonds and mortgages in controversy. There is no challenge of the statutes by which they were authorized. By those statutes the treasurer was directed, when it became necessary to borrow money for the payment of the subscription, to prepare coupon bonds and advertise in one or more newspapers for sealed proposals, and to accept the terms offered most advantageous to the State, provided that in no event should the bonds be sold for less than their par value. The advertisement was made, no bids were received, but the bonds were delivered to the railroad company as payment for the subscription, dollar for dollar. Upon each bond was placed the statutory pledge or mortgage. It is true no money was paid into the treasury and thence out of the treasury to the railroad company, yet looking at the substance of the transaction (and equity has regard to substance rather than form), the transaction was the same as though the company had been the only bidder, had placed a thousand dollars in the treasury in payment of each bond and received that thousand dollars back from

the treasury in payment of the subscription for ten shares of stock. It is true also that there was no formal issue of certificates by the company to the State, but that was a matter of arrangement between the parties to the subscription. The State's right as a stockholder was not abridged by lack of the certificates, and in fact it has been receiving dividends on the stock exactly as though certificates had been issued. The statute also provided that with each several bond a deed of mortgage for an equal amount of stock, signed by the treasurer and countersigned by the comptroller, should constitute a part of the bond and be transferable in like manner with it, "and further, that such mortgage shall have all the force and effect, in law and equity, of registered mortgages without actual registry." While no certificate of stock was to be attached to or go with the bond the statute evidently contemplated that the mortgage endorsed on the bond should have the same force and effect. Hence, when the endorsement was made and the bond issued by the State it was tantamount to a separation and identification of the number of shares named therein. It cannot be that the State having provided this means of giving to each bond the mortgage security of the corresponding shares of stock can now prevent the attaching of the lien on the ground that no shares had been separated and no certificate transferred. It is unnecessary to refer to chap. 98 of the Laws of 1879, for that act was one in the nature of an offer to compromise, although it does contain a recognition of outstanding obligations.

Neither can there any question respecting the title of South Dakota to these bonds. They are not held by the State as representative of individual owners, as in the case of *New Hampshire* v. *Louisiana*, (108 U. S. 76,) for they were given outright and absolutely to the State. It is true that the gift may be considered a rare and unexpected one. Apparently the statute of South Dakota was passed in view of the expected gift, and probably the donor made the gift under a not unreasonable expectation that South Dakota would bring an action against North Carolina to enforce these bonds, and that such action might enure to his benefit as the owner of other like bonds. But the motive with which a gift is made, whether good or bad, does not affect its validity or the question of jurisdiction. This has been often ruled. In *M'Donald* v. *Smalley*, (1 Pet. 620,) an objection to the jurisdiction on the ground that the title to the property in controversy had been conveyed to the plaintiff in the belief that it would be sustained by the Federal when it would not be by the State court, was overruled, with this observation by Chief Justice Marshall (p. 624):

"This testimony, which is all that was laid before the court, shows, we think, a sale and conveyance to the plaintiff which was binding on both parties. M'Donald could not have maintained an action for his debt, nor M'Arthur a suit for his land. His title to it was extinguished, and the consideration was received. The motives which induced him to make the

contract, whether justifiable or censurable, can have no influence on its validity. They were such as had sufficient influence with himself, and he had a right to act upon them. A court cannot enter into them when deciding on its jurisdiction. The conveyance appears to be a real transaction, and the real as well as the nominal parties to the suit are citizens of different States."

See also *Smith* v. *Kernochen*, (7 How. 198;) *Barney* v. *Baltimore*, (6 Wall. 280;) *Dickinson* v. *Northern Trust Co.*, (176 U. S. 181, 190, 191, 192.) In this last case Mr. Justice Brown, speaking for the court, said:

"If the law concerned itself with the motives of parties new complications would be introduced into suits which might seriously obscure their real merits. If the debt secured by a mortgage be justly due, it is no defense to a foreclosure that the mortgagee was animated by hostility or other bad motive. (*Davis* v. *Flagg*, 35 N. J. Eq. 491; *Dering* v. *Earl of Winchelsea*, 1 Cox Ch. 318; *McMullen* v. *Ritchie*, 64 Fed. Rep. 253, 261; *Toler* v. *East Tenn. &c. Railway*, 67 Fed. Rep. 168.) . . . The reports of this court furnish a number of analogous cases. Thus, it is well settled that a mere colorable conveyance of property, for the purpose of vesting title in a non-resident and enabling him to bring suit in a Federal court, will not confer jurisdiction; but if the conveyance appear to be a real transaction, the court will not, in deciding upon the question of jurisdiction, inquire into the motives which actuated the parties in making the conveyance. (*M'Donald* v. *Smalley*, 1 Pet. 620; *Smith* v. *Kernochen*, 7 How. 198; *Barney* v. *Baltimore*, 6 Wall. 280; *Farmington* v. *Pillsbury*, 114 U. S. 138; *Crawford* v. *Neal*, 144 U. S. 585.)

"The law is equally well settled that, if a person take up a *bona fide* residence in another State, he may sue in a Federal court, notwithstanding his purpose was to resort to a forum of which he could not have availed himself if he were a resident of the State in which the court was held. (*Cheever* v. *Wilson*, 9 Wall. 108, 123; *Briggs* v. *French*, 2 Sumn. 251; *Catlett* v. *Pacific Ins. Co.*, 1 Paine, 594; *Cooper* v. *Galbraith*, 3 Wash. 546; *Johnston* v. *Monell*, Wool. 390.)"

The title of South Dakota is as perfect as though it had received these bonds directly from North Carolina. We have, therefore, before us the case of a State with an unquestionable title to bonds issued by another State, secured by a mortgage of railroad stock belonging to that State, coming into this court and invoking its jurisdiction to compel payment of those bonds and a subjection of the mortgaged property to the satisfaction of the debt.

Has this court jurisdiction of such a controversy, and to what extent may it grant relief? Obviously that jurisdiction is not affected by the fact that the donor of these bonds could not invoke it. The payee of a foreign bill of exchange may not sue the drawer in the Federal court of a State of which both are citizens, but that does not oust the court of jurisdiction of an action by a subsequent holder if the latter be a citizen of another State. The question of jurisdiction is determined by the status of the present parties, and not by that of prior holders of the thing in controversy. Obvi-

ously, too, the subject matter is one of judicial cognizance. If anything can be considered as justiciable it is a claim for money due on a written promise to pay—and if it be justiciable does it matter how the plaintiff acquires title, providing it be honestly acquired? It would seem strangely inconsistent to take jurisdiction of an action by South Dakota against North Carolina on a promise to pay made by the latter directly to the former, and refuse jurisdiction of an action on a like promise made by the latter to an individual and by him sold or donated to the former.

A preliminary question arises from the fact that representatives of the two classes of bonds are made defendants, and that a part of the relief asked is a sale of the thirty thousand shares of stock of the North Carolina Railroad Company, belonging to the State of North Carolina, in satisfaction and discharge of all the mortgages upon such stock. It is insisted that these individuals, owners of the bonds, although named as defendants, are in fact occupying an adverse position to that of the State, and that the effect of their presence as parties is a practical nullification of the Eleventh Amendment, in that it is giving to individuals relief by judgment against the State. Apparently one expectation of the donor to South Dakota was that in some way the bonds retained by himself would be placed in judgment and relief obtained against North Carolina in the suit commenced by South Dakota. But we think that these individuals are not necessary parties-defendant, and that no relief should be given to them or to the classes of bondholders they represent. The statute under which the mortgage was executed provided that with each of the bonds a deed of mortgage for a like amount of stock should be executed by the State There is, therefore, a separate mortgage of ten shares of stock on each one of these bonds, and that mortgage can be fully satisfied by a decree of foreclosure and sale of the ten shares of stock. No one would doubt that, if a certificate of stock was attached as a pledge to a note, the pledge could be satisfied by a sale of the stock without any determination of the rights of the purchaser as between himself and other stockholders. And such was the manifest purpose of this legislation. It contemplated that each bondholder should receive a stock security which he could realize on without the delay and expense of a suit to which all other stockholders and the corporation would be necessary parties. The purchaser at the sale to be authorized by this decree will become vested with the full title of the State to the number of shares of stock stated in the mortgage. He will occupy the same position in relation to the corporate property that other stockholders occupy, and have whatever rights they have. It is not necessary for a full satisfaction of the mortgage on one of these bonds that any other mortgage upon another bond be also foreclosed, or that a decree be entered determining what rights the purchaser will have by virtue of the stock which he obtains at the sale. So far then as

these individual defendants are concerned, the suit will be dismissed with costs against South Dakota.

Coming now to the right of South Dakota to maintain this suit against North Carolina, we remark that it is a controversy between two States; that by sec. 2, art. III, of the Constitution this court is given original jurisdiction of "controversies between two or more States." In *Missouri* v. *Illinois and the Sanitary District of Chicago*, (180 U. S. 208,) Mr. Justice Shiras, speaking for the court, reviewed at length the history of the incorporation of this provision into the Federal Constitution and the decisions rendered by this court in respect to such jurisdiction, closing with these words (p. 240):

"The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting the property rights and interests of a State."

The present case is one "directly affecting the property rights and interests of a State."

Although a repetition of this review is unnecessary, two or three matters are worthy of notice. The original draft of the Constitution reported to the convention gave to the Senate jurisdiction of all disputes and controversies "between two or more States, respecting jurisdiction or territory," and to the Supreme Court jurisdiction of "controversies between two or more States, except such as shall regard territory or jurisdiction." A claim for money due being a controversy of a justiciable nature, and one of the most common of controversies, would seem to naturally fall within the scope of the jurisdiction thus intended to be conferred upon the Supreme Court. In the subsequent revision by the convention the power given to the Senate in respect to controversies between the States was stricken out as well as the limitation upon the jurisdiction of this court, leaving to it in the language now found in the Constitution jurisdiction without any limitation of "controversies between two or more States."

The Constitution as it originally stood also gave to this court jurisdiction of controversies "between a State and citizens of another State." Under that clause *Chisholm* v. *Georgia*, (2 Dall. 419,) was decided, in which it was held that a citizen of one State might maintain in this court an action of assumpsit against another State. In consequence of that decision the Eleventh Amendment was adopted, which provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." It will be perceived that this amendment only granted to a State immunity from suit by an individual, and did not affect the jurisdiction over controversies between two or more States. In respect to this it was said by Chief Justice Marshall in *Cohens* v. *Virginia* (6 Wheat. 264, 406):

"It is a part of our history that, at the adoption of the Constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the Federal courts formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State legislatures. That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more States, or between a State and a foreign State. The jurisdiction of the court still extends to these cases; and in these a State may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister States would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States."

In the same case, after referring to the two classes of cases, jurisdiction of which was vested in the courts of the Union, he said (p. 378):

"In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended 'controversies between two or more States, between a State and citizens of another State,' 'and between a State and foreign States, citizens or subjects.' If these be the parties it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union."

In *Rhode Island* v. *Massachusetts*, (12 Pet. 657,) this court sustained its jurisdiction of a suit in equity brought by one State against another to determine a dispute as to boundary, and in the course of the opinion, by Mr. Justice Baldwin, said in respect to the immunity of a sovereign from suit by an individual (p. 720):

"Those States, in their highest sovereign capacity, in the convention of the people thereof, . . . adopted the Constitution, by which they respectively made to the United States a grant of judicial power over controversies between two or more States. By the Constitution, it was ordained that this judicial power, in cases where a State was a party, should be exercised by this court as one of original jurisdiction. The States waived their exemption from judicial power, (6 Wheat. 378, 80,) as sovereigns by original and inherent right, by their own grant of its exercise over themselves in such cases, but which they would not grant to any inferior tribunal. By this grant, this court has acquired jurisdiction over the parties in this cause, by their own consent and delegated authority; as their agent for executing the judicial power of the United States in the cases specified."

And, again, in reference to the extent of the jurisdiction of this court (p. 721):

"That it is a controversy between two States cannot be denied; and, though the Constitution does not, in terms, extend the judicial power to all controversies between two or more States, yet it, in terms, excludes none, whatever may be their nature or subject."

In *United States* v. *North Carolina*, (136 U. S. 211,) we took jurisdiction of an action brought by the United States against North Carolina to recover interest on bonds, and decided the case upon its merits. It is true there was nothing in the opinion in reference to the matter of jurisdiction, but as said in *United States* v. *Texas* (143 U. S. 621, 642):

"The cases in this court show that the framers of the Constitution did provide, by that instrument, for the judicial determination of all cases in law and equity between two or more States, including those involving questions of boundary. Did they omit to provide for the judicial determination of controversies arising between the United States and one or more of the States of the Union? This question is in effect answered by *United States* v. *North Carolina*, (136 U. S. 211.) That was an action of debt brought in this court by the United States against the State of North Carolina upon certain bonds issued by that State. The State appeared, the case was determined here upon its merits and judgment was rendered for the State. It is true that no question was made as to the jurisdiction of this court, and nothing was therefore said in the opinion upon that subject. But it did not escape the attention of the court, and the judgment would not have been rendered except upon the theory that this court has original jurisdiction of a suit by the United States against a State."

See also *United States* v. *Michigan*, (190 U. S. 379,) decided at the last term, in which a bill in equity for an accounting and a recovery of money was sustained. Mr. Justice Peckham, delivering the unanimous opinion of the court, said (pp. 396, 406):

"By its bill the United States invokes the original jurisdiction of this court for the purpose of determining a controversy existing between it and the State of Michigan. This court has jurisdiction of such a controversy, although it is not literally between two States, the United States being a party on the one side and a State on the other. This was decided in *United States* v. *Texas*, (143 U. S. 621, 642.) . . . There must be judgment overruling the demurrer, but as the defendant may desire to set up facts which it might claim would be a defense to the complainant's bill, we grant leave to the defendant to answer up to the first day of the next term of this court. In case it refuses to plead further, the judgment will be in favor of the United States for an accounting for the payment of the sum found due thereon."

We are not unmindful of the fact that in *Hans* v. *Louisiana*, (134 U. S. 1,) Mr. Justice Bradley, delivering the opinion of the court, expressed his concurrence in the views announced by Mr. Justice Iredell, in the dissenting opinion in *Chisholm* v. *Georgia*, but such expression cannot be considered as a judgment of the court, for the point decided was that, con-

struing the Eleventh Amendment according to its spirit rather than by its letter, a State was relieved from liability to suit at the instance of an individual, whether one of its own citizens or a citizen of a foreign State. Without noticing in detail the other cases referred to by Mr. Justice Shiras in *Missouri* v. *Illinois et al., supra*, it is enough to say that the clear import of the decisions of this court from the beginning to the present time is in favor of its jurisdiction over an action brought by one State against another to enforce a property right. *Chisholm* v. *Georgia* was an action of assumpsit, *United States* v. *North Carolina* an action of debt, *United States* v. *Michigan* a suit for an accounting, and that which was sought in each was a money judgment against the defendant State.

But we are confronted with the contention that there is no power in this court to enforce such a judgment, and such lack of power is conclusive evidence that, notwithstanding the general language of the Constitution, there is an implied exception of actions brought to recover money. The public property held by any municipality, city, county or State is exempt from seizure upon execution because it is held by such corporation, not as a part of its private assets, but as a trustee for public purposes. (*Meriwether* v. *Garrett*, 102 U. S. 472, 513.) As a rule no such municipality has any private property subject to be taken upon execution. A levy of taxes is not within the scope of the judicial power except as it commands an inferior municipality to execute the power granted by the legislature.

In *Rees* v. *City of Watertown*, (19 Wall. 107, 116, 117,) we said:

"We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important."

See also *Heine* v. *The Levee Commissioners*, (19 Wall., 655, 661;) *Meriwether* v. *Garrett*, *supra*.

In this connection reference may be made to *United States* v. *Guthrie*, (17 How. 284,) in which an application was made for a mandamus against the Secretary of the Treasury to compel the payment of an official salary, and in which we said (p. 303):

"The only legitimate inquiry for our determination upon the case before us is this: Whether, under the organization of the Federal government or by any known principle of law, there can be asserted a power in the Circuit Court of the United States for the District of Columbia, or in this court, to command the withdrawal of a sum or sums of money from the Treasury of the United States, to be applied in satisfaction of disputed or controverted claims against the United States? This is the question, the

very question presented for our determination; and its simple statement would seem to carry with it the most startling considerations—nay, its unavoidable negation, unless this should be prevented by some positive and controlling command; for it would occur, *a priori*, to every mind, that a treasury, not fenced round or shielded by fixed and established modes and rules of administration, but which could be subjected to any number or description of demands, asserted and sustained through the undefined and undefinable discretion of the courts, would constitute a feeble and inadequate provision for the great and inevitable necessities of the nation. The government under such a *regime*, or rather, under such an absence of all rule, would, if practicable at all, be administered, not by the great department ordained by the Constitution and laws, and guided by the modes therein prescribed, but by the uncertain and perhaps contradictory action of the courts, in the enforcement of their views of private interests."

Further, in this connection may be noticed *Gordon* v. *United States*, (117 U. S. 697,) in which this court declined to take jurisdiction of an appeal from the Court of Claims, under the statute as it stood at the time of the decision, on the ground that there was not vested by the act of Congress power to enforce its judgment. We quote the following from the opinion, which was the last prepared by Chief Justice Taney, (pp. 702, 704):

"The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. . . . Indeed, no principle of constitutional law has been more firmly established or constantly adhered to than the one above stated—that is, that this court has no jurisdiction in any case where it cannot render judgment in the legal sense of the term; and when it depends upon the legislature to carry its opinion into effect or not, at the pleasure of Congress." See also *In re Sanborn*, (148 U. S. 222,) and *La Abra Silver Mining Company* v. *United States*, (175 U. S. 423, 456.)

We have, then, on the one hand the general language of the Constitution vesting jurisdiction in this court over "controversies between two or more States," the history of that jurisdictional clause in the convention, the cases of *Chisholm* v. *Georgia*, *United States* v. *North Carolina* and *United States* v. *Michigan*, (in which this court sustained jurisdiction over actions to recover money from a State,) the manifest trend of other decisions, the necessity of some way of ending controversies between States, and the fact that this claim for the payment of money is one justiciable in its nature; on the other, certain expression of individual opinions of justices of this court, the difficulty of enforcing a judgment for money against a State, by reason of its ordinary lack of private property subject to seizure upon execution, and the absolute inability of a court to compel a levy of taxes by the legislature. Notwithstanding the embarrassments which surround the question it is directly presented and may have to be determined before the case is finally concluded, but for the present it is sufficient to state the question with its difficulties.

There is in this case a mortgage of property, and the sale of that property under a foreclosure may satisfy the plaintiff's claim. If that should be the result there would be no necessity for a personal judgment against the State. That the State is a necessary party to the foreclosure of the mortgage was settled by *Christian* v. *Atlantic & North Carolina Railroad Company*, (133 U. S. 233.) Equity is satisfied by a decree for a foreclosure and sale of the mortgaged property, leaving the question of a judgment over for any deficiency, to be determined when, if ever, it arises. And surely if, as we have often held, this court has jurisdiction of an action by one State against another to recover a tract of land, there would seem to be no doubt of the jurisdiction of one to enforce the delivery of personal property.

A decree will, therefore, be entered, which, after finding the amount due on the bonds and coupons in suit to be twenty-seven thousand four hundred dollars ($27,400), (no interest being recoverable, *United States* v. *North Carolina*, 136 U. S. 211), and that the same are secured by one hundred shares of the stock of the North Carolina Railroad Company, belonging to the State of North Carolina, shall order that the said State of North Carolina pay said amount with costs of suit to the State of South Dakota on or before the 1st Monday of January, 1905, and that in default of such payment an order of sale be issued to the Marshal of this court, directing him to sell at public auction all the interest of the State of North Carolina in and to one hundred shares of the capital stock of the North Carolina Railroad Company, such sale to be made at the east front door of the Capitol Building in this city, public notice to be given of such sale by advertisements once a week for six weeks in some daily paper published in the city of Raleigh, North Carolina, and also in some daily paper published in the city of Washington.

And either of the parties to this suit may apply to the court upon the foot of this decree, as occasion may require.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 8, Original.—October Term, 1903.

The State of South Dakota, Complainant,
vs.
The State of North Carolina, Charles Salter, and Simon Rothschild.

[February 1, 1904.]

Mr. Justice White, with whom concurred Mr. Chief Justice Fuller, Mr. Justice McKenna and Mr. Justice Day, dissenting:

The decision in this cause seems to me to disregard an express and absolute prohibition of the Constitution. The facts are stated in the opinion of the court. As, however, there are some facts deemed by me to be material, which are not referred to, it is proposed to make a summary of the case, and then express the reasons which control me.

In the years 1847 and 1855 the negotiable bonds of the State of North Carolina were issued to aid in the construction of the railway of the North Carolina Railroad Company and were exchanged for the stock of that company. The bonds went into the hands of individuals and the exchanged stock passed into the possession of the State, and was declared to be pledged in the hands of the State to secure the payment of the bonds in question.

In 1855 and 1866 similar aid was given to another railway, the Western North Carolina. Bonds, each for the par value of one thousand dollars, aggregating nearly two and a half millions of dollars, were issued by the State. All the bonds, which were issued after the passage, in 1866, of an act of the legislature, were declared to be secured, as stated in the act, by a mortgage of the stock of the North Carolina Railroad held by the State and already, in its entirety, pledged for the security of all the bonds which had been previously issued in aid of the North Carolina Railroad. The stock, however, remained in possession of the State, but each of the bonds thereafter issued contained an endorsement that ten shares of stock of the North Carolina Railroad Company in the hands of the State were mortgaged as security for the payment of each of the bonds.

Presumably, as a result of the disastrous consequences of the civil war and the events which followed the financial affairs of the State of North Carolina in 1879 were profoundly embarrassed. The State had not paid the interest as it accrued on the bonds issued in aid of the North Carolina

Railroad. It had in effect paid no interest whatever on the bonds issued in favor of the Western North Carolina Railroad, and, indeed, had defaulted generally in the payment of the interest on its public debt. Statutes were passed by the State providing for an adjustment of its financial affairs, so as to rehabilitate its credit, in order that when the State debt was readjusted the State might, for the benefit of all its people and its creditors, be able to pay the interest on and provide for the principal of the public debt. The adjustment made was accepted by those holding the bonds issued in aid of the North Carolina Railroad and they waived a very large sum of unpaid interest and received new bonds, accompanied with a reiteration of the pledge of all the stock of the North Carolina Railroad owned by the State, which had always been held by the State as security for the payment of all the bonds of that issue. It is to be inferred from the record that the adjustment proposed was generally accepted by the other creditors of the State, and that as a consequence its fiscal affairs were placed upon a sound basis. Be this as it may, certain is it that the adjustment was accepted by the holders of a vast majority of the bonds issued in aid of the Western North Carolina Railroad, and that such holders surrendered their old bonds and took new bonds of the State for twenty-five per cent of the face value of their bonds, these new bonds not purporting to be secured by any mortage of the stock of the North Carolina Railroad.

In 1901—twenty-two years after the passage of the acts referred to, and their acceptance as above stated, Simon Schafer and his brother, composing the firm of Schafer & Brothers, bankers and brokers in the city of New York, addressed a petition to the legislature of North Carolina. Therein it was recited that the parties named were the holders, in their own right and as trustees, of nearly two hundred and fifty thousand dollars of the bonds issued in aid of the Western North Carolina Railroad Company, attached to which were unpaid interest coupons for more than thirty years. The petitioners declared that these bonds were substantially all the bonds of the series then outstanding because the holders thereof had not accepted the arrangement of 1879. It was stated that such arrangements had been accepted by the vast majority of others who held such bonds by reason of the financial stress of the State at the time, and because those creditors knew that the stock of the North Carolina Railroad mortgaged to secure the bonds was of no avail for such purpose, since its value at the time of the adjustment was not adequate to pay the bonds issued in aid of the North Carolina Railroad, in favor of which it was first pledged. It was recited that the petitioners had not availed of the adjustment because they preferred waiting a restoration of the credit of the State, and trusted that the stock of the North Carolina Railroad might ultimately prove adequate to pay the bonds as reduced, issued in favor of the North Caro-

lina Railroad, and the small amount of bonds which remained outstanding, as a result of the adjustment. It was declared that this had been accomplished; that in consequence of the reduced amount of the North Carolina Railroad bonds bronght about by the adjustment, and the retirement thereby effected of all the bonds of the Western North Carolina Railroad except the small amount held or represented by the petitioners, the stock of the North Carolina Railroad held by the State, if sold, would be adequate to pay both series and leave a balance in favor of the State. Reciting that the petitioners and those they represented were aware that their claims against the State could not be judicially enforced either in the State or Federal courts, the prayer was that an appropriation might be made to pay their bonds in principal and accumulated interest, or that in default an act be passed authorizing suit in the courts to enforce the mortgage lien asserted to exist on the stock of the North Carolina Railroad. The prayer of this petition was not granted.

Shortly following the failure to act favorably upon the petition just referred to, the act of the legislature of South Dakota, set out in the opinion of the court, was passed. It will be observed that, among other things, it empowered the governor to accept gifts made to the State of bonds or choses in action, and authorized the attorney general of the State, when such gifts were accepted, to bring suit in the name of the State to enforce payment of the same, and for that purpose "to employ counsel to be associated with him in such suits or actions, who, with him, shall fully represent the State, and shall be entitled to reasonable compensation (italics mine) *out of the recoveries and collections in such suits and actions.*" Thereupon Simon Schafer addressed the letter to the Hon. Charles H. Burke, a member of Congress from South Dakota, which is reproduced in full in the opinion of the court. It suffices to say that by that letter ten of the bonds were given to the State of South Dakota, and it was specially mentioned that the gift was made because Schafer was aware that he could not sue the State of North Carolina, whilst the State of South Dakota could do so. The letter also contained the suggestion, presumably as an inducement to an acceptance by the State, that if the ten bonds were enforced by the State of South Dakota, other gifts of similar bonds might be made. The bonds were accepted by the governor of South Dakota, and the attorney general of that State thereupon filed the present bill. The parties defendant were the State of North Carolina, a person sued as representing all the holders of bonds issued in aid of the North Carolina Railroad and a person sued as representative of the holders of the outstanding bonds issued in aid of the Western North Carolina Railroad. The prayer of the bill was in substance for a decree against the State of North Carolina for the amount of the principal of the bonds and for more than thirty years' accrued interest; for an enforcement of the mortgage asserted to exist on the stock

of the North Carolina Railroad Company held by the State; for a decree declaring that the holders of the bonds issued in favor of the North Carolina Railroad Company had lost their prior lien upon the whole stock by reason of their acceptance of the compromise under the act of 1879, and the taking of new bonds by them in pursuance thereof. It was, however, prayed that in the event it sh d be found that the lien of such bondholders on the stock had not been waived, the stock be ordered sold free from all encumbrances to satisfy the claims of the respective lienholders thereon, and that distribution be made of the proceeds of the stock among them according to priority.

The State answered, challenging the jurisdiction of this court to entertain the bill, and also urging various defenses on the merits.

The person joined as representing the bonds issued in aid of the North Carolina Railroad made no appearance. Charles Salter, who was made defendant as representative of the holders of the bonds issued in aid of the Western North Carolina Railroad, answered, substantially admitting all the allegations of the bill, but praying "that plaintiff's bill be dismissed with costs, unless the court shall decree that all the stock subject to the second mortgage be sold for the benefit of all the holders of said second mortgage bonds."

The court now decides that it has jurisdiction, because of the delegation, in the second section of the third article of the Constitution, of judicial power to the United States over "controversies between two or more States," and because of the grant to this court of original jurisdiction over cases in which a State shall be a party. Whilst conceding that if the holders of the bonds issued in aid of the North Carolina Railroad are necessary parties the jurisdiction would be ousted, it is held that such bondholders are not necessary parties, since there may be a sale to enforce complainant's rights of a portion of the stock held by the State of North Carolina, subject to the prior rights therein of the holders of such bonds. The decree which will be entered will, therefore, adjudge the State of North Carolina to be indebted to South Dakota in the amount of the principal of the ten bonds, with more than thirty years' accrued interest. The decree will direct the sale of the stock in the North Carolina Railroad Company held by the State, subject to the prior pledge in favor of the holders of the bonds of the North Carolina Railroad. The question of a deficiency decree is reserved, in case, as a result of the sale, the debt decreed against the State should not be extinguished.

With this summary of the pleadings, the facts, and the decision of the court in mind, I shall now state the reasons which compel me to dissent, all of which may be embraced in the two following general propositions which I shall examine under separate headings: (A) The absolute want of power in the court to render a decree between the two States on the

cause of action sued on; and (B) The want of power to render the decree which is now directed to be entered, because of the absence of essential parties whose presence would oust jurisdiction and the impotency to grant any relief whatever in the absence of such parties.

(A.)

The absolute want of power in the court to render a decree between the two States on the cause of action sued on.

FIRST. The power of this court to award a decree against the State of North Carolina is based on the provision in the second section of the third article of the Constitution, extending the judicial power of the United States over "controversies between two or more States," and to the delegation to this court of original jurisdiction over such controversies. If the provisions in question were the only ones on the subject it might be more difficult to deny that the Federal judicial power embraced this controversy. Those provisions, however, do not stand alone, since they must be considered in connection with the Eleventh Amendment to the Constitution, providing that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state." The question which the case involves is not what in a generic sense may be considered a controversy between States, but whether the particular claim here asserted by the State of South Dakota is in any view such a controversy. It is also to be observed that the question is not whether a controversy between States may not arise from a debt originating as the result of a direct transaction between States, but is whether one State can acquire a claim asserted against another State by a citizen of that or of another State or an alien, and as a result sue upon it, and thereby create a controversy between States in a constitutional sense. Indeed, the question is narrower than this, since in this case the alleged debtor State had years before the transfer of the claim in question, while it was yet owned by individuals, declined to recognize the debt, and had refused payment thereof, as the result of a controversy between itself and its alleged creditors.

I take it to be an elementary rule of constitutional construction that no one provision of the Constitution is to be segregated from all the others, and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purposes of the instrument. If, in following this rule, it be found that an asserted construction of any one provision of the Constitution would, if adopted, neutralize a positive prohibition of another provision of that instrument, then it results that such asserted construction is erroneous, since its enforcement would mean, not to give effect

to the Constitution, but to destroy a portion thereof. My mind cannot escape the conclusion that if, wherever an individual has a claim, whether in contract or tort, against a State, he may, by transferring it to another State, bring into play the judicial power of the United States to enforce such claim, then the prohibition contained in the Eleventh Amendment is a mere letter, without spirit and without force. This is said because no escape is seen from the conclusion if the application of the prohibition is to depend solely upon the willingness of the creditor of a State, whether citizen or alien, to transfer, and the docility or cupidity of another State in accepting such transfer, that the provision will have no efficacy whatever. And this becomes doubly cogent when the history of the Eleventh Amendment is considered and the purpose of its adoption is borne in mind.

It is familiar that the amendment was adopted because of the decision of this court in 1793, in *Chisholm* v. *Georgia*, (2 Dall. 419,) holding that the grant of judicial power to the United States to determine controversies between a State and a citizen of another State vested authority to determine a controversy wherein a citizen of a State asserted a claim against another State. That the purpose of the amendment was to remove the possibility of the assertion of such a claim is aptly shown by the passage from the opinion of Mr. Chief Justice Marshall in *Cohens* v. *Virginia*, (6 Wheat. 264,) as quoted in the opinion of the court in this case, saying (p. 406):

"It is a part of our history that, at the adoption of the Constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the Federal courts formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State legislatures."

As the purpose of the amendment was to prohibit the enforcement of individual claims against the several States by means of the judicial power of the United States, and as the amendment was subsequent to the grant of judicial power made by the Constitution, the amendment qualified the whole grant of judicial power to the extent necessary to render it impossible by indirection to escape the operation of the avowed purpose which the people of the United States expressed in adopting the amendment. How, as declared by Chief Justice Marshall, could the adoption of the amendment have quieted the apprehensions concerning the right to enforce private claims against the States, if the power was left open after the amendment to do so, if only they were transferred to another State? It is also to be observed that the construction now given causes the judicial power of the United States to embrace claims not within even the reach of the ruling in *Chisholm* v. *Georgia*, for that case only decided that under the grant of power a citizen of one State might sue another State. But under the rule

of construction, now announced, not only claims held by citizens of other States and aliens, but those held by a citizen of the State, become capable of enforcement, if only the holders of such claims, after the State has refused to pay them, choose to sell or make gift thereof to another State found willing to become a party to a plan to evade a constitutional provision inserted for the protection of all the States.

Let me, *arguendo*, grant that a case may be conceived of where one provision of the Constitution can be so construed as to render nugatory another and applicable provision. Even such an impossible doctrine can have no relation to the case in hand. The decisions of this court, rendered since the Eleventh Amendment, have consistently held that that amendment embodied a principle of national public policy, whose enforcement may not be avoided by indirection or subterfuge. Ought this rule of public policy to be disregarded, by endowing every State with the power of speculating upon stale and unenforceable claims of individuals against other States, thus not only doing injustice, but also overthrowing the fiscal independence of every State, and destroying that harmony between them which it was the declared purpose of the Constitution to establish and cement? Such a departure from the provisions of the Eleventh Amendment, and the rule of national public policy which it embodies, may not be sustained by the assumption that it would be unduly curtailing the independence of the several States to deny them the right of enforcing, by the aid of the Federal judicial power, claims against other States acquired from private individuals. For this assumption would amount to this, that any and all of the States only enjoy the essential privilege of being free from coercion as to the claims of individuals, and have the power to manage their financial affairs at the mere pleasure of any of the other States. This is to say, that for the purpose of preserving the rights of the States, those rights must be destroyed.

It is true that the greater number of cases decided by this court concerning the right to enforce a private claim against a State concerned controversies where suit was brought by citizens of other States or aliens, who were therefore persons expressly within the terms of the Eleventh Amendment. An analysis of those cases, however, will show that they were decided, not upon the mere ground that the person who sued was within the Eleventh Amendment, but upon the board proposition that, by the effect of that amendment, claims of private individuals could not be enforced against a State, and that in upholding this constitutional limitation the court would look at the real nature of the controversy, irrespective of the parties on the record. If it were found by doing so that in effect the consequence of the granting of the relief would be to enforce by the Federal judicial power the claim of a private individual against a State, such relief would be denied. I content myself with the reference in the margin

to the leading cases of this character,* and come at once to consider the adjudications of this court rendered in two cases which directly related to the operation of the prohibitions of the Eleventh Amendment on the grant of judicial power to the United States over controversies between States, and to two other cases which directly concerned the effect of the prohibitions of the Eleventh Amendment in suits brought by persons who were within the grant of the judicial power but were not embraced within the category of persons specifically referred to in the Eleventh Amendment. The first two cases referred to are *New Hampshire* v. *Louisiana* and *New York* v. *Louisiana*. The opinion of the court in both was delivered by Mr. Chief Justice Waite, and is reported (1883) in 108 U. S. 76. The suits were originally brought in this court. The complainants were, in the one case, the State of New Hampshire, and in the other the State of New York; the principal defendant in both cases being the State of Louisiana. The complainant States asserted the right to enforce certain pecuniary claims against the State of Louisiana, as the holders of the naked legal title to certain coupons and bonds of the State of Louisiana, which, pursuant to legislative authority, by assignment, had been acquired from citizens of the respective States, for the purpose of collection for the benefit of such citizens. The defendant State challenged the jurisdiction of this court over the controversy. To sustain such jurisdiction it was pressed by the complainant that the bonds and coupons were negotiable instruments, of which the assignee States became the legal owners, and that as such they as a matter of law were the real parties in interest, whether the transfer was a complete sale or merely made for the purpose of collection for the benefit of the assignors. The court first considered the grant of judicial power to the United States prior to the adoption of the Eleventh Amendment and held that as such power, when originally conferred, as interpreted in *Chisholm* v. *Georgia*, embraced the right of a citizen of one State to enforce his claims by suit directly against another State, a State could not, as the holder of the legal title, champion for its citizens a right for the prosecution of which a particular remedy had been

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* Hollingsworth *v.* Virginia, (1798) 3 Dall. 378; Osborn *v.* Bank, (1824) 9 Wheat. 739, 849; Briscoe *v.* Bank, (1837) 11 Pet. 321; Louisiana *v.* Jumel, (1883) 107 U. S. 711; Poindexter *v.* Greenhow, (1887) 114 U. S. 270, 286; Marye *v.* Parsons, (1885) 114 U. S. 325; Hagood *v.* Southern, (1886) 117 U. S. 52; In re Ayers, (1887) 123 U. S. 443, 504; Christian *v.* Atlantic & N. C. R. R. Co., (1890) 133 U. S. 233, 243; Louisiana ex rel. N. Y. Guaranty & Indemnity Co. *v.* Steele, (1890) 134 U. S. 230; Pennoyer *v.* McConnaughy, (1891) 140 U. S. 11; In re Tyler, (1893) 149 U. S. 164, 190; Regan *v.* Farmers' Loan & Trust Co., (1894) 154 U. S. 362, 388; Scott *v.* Donald, (1897) 165 U. S. 58; Tindal *v.* Wesley, (1897) 167 U. S. 204, 219; Smyth *v.* Ames, (1898) 169 U. S. 466, 518; Fitts *v.* McGhee, (1899) 172 U. S. 516, 524.

provided by the Constitution. Coming to generally consider the effect of the Eleventh Amendment as elucidated by the history connected with its adoption, it was decided that as that amendment had expressly taken away the right of a citizen of one State to sue another State, a State could not enforce a right the assertion of which in the courts was prohibited to the citizen himself. Noticing the contention that the grant of judicial power over controversies between States was but a substitute for the surrender to the national government which each State had made, of the power of prosecuting against another State, by force if necessary as a sovereign trustee for its citizens, the claims of such citizens, the proposition was held not to be sustainable, under the Constitution of the United States. It was decided that the special remedy originally granted to the citizen himself "must be deemed to have been the only remedy the citizen of one State could have under the Constitution against another State for the redress of his grievances, except such as the delinquent State saw fit itself to grant." Having announced this doctrine, it was then, as an inevitable deduction from it decided that, as the Eleventh Amendment had taken away the special remedy originally provided by the Constitution, there was no other remedy whatever left. The opinion of the court concluded as follows (p. 91):

"The evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be sued and, in our opinion, one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens. Such being the case, we are satisfied that we are prohibited, both by the letter and the spirit of the Constitution, from entertaining these suits, and the bill in each of them is, consequently, dismissed."

To me it seems that this adjudication is conclusive of the question now here. It in the broadest way determined that the prohibitions of the Eleventh Amendment controlled the grant of judicial power as to controversies between the States so as to exclude the possibility of that grant vesting a State with authority in any form, directly or indirectly, to set at naught the Eleventh Amendment. The case was decided, not upon the particular nature of the title of the bonds and coupons asserted by the States of New Hampshire and New York, since it was conceded that, but for the Constitution, a title such as that propounded would have given rise to an adequate cause of action. The ruling of the court was that, as suits against a State upon the claims of private individuals was absolutely prohibited by the Eleventh Amendment, such character of claim could not be converted into a controversy between States, and thus be made justiciable, since to do so would destroy the prohibition which the Eleventh Amendment embodied. I do not perceive, if one State may not engender a con-

troversy between States, in the constitutional sense, in respect to claims arising out of dealings between a State and individuals, how it was competent for the State of South Dakota to create such a controversy by the acquisition of a claim of the class whose enforcement it was the purpose of the Eleventh Amendment to effectually prohibit. It is to be observed that in the cases referred to the court did not deny that a sovereign State, in virtue of its existence as such, would not have possessed the inherent power to prosecute against another State the claims of its citizens, and that such a prosecution by it would have constituted a controversy between States in the international significance of those words. But the court held that controversies between States, in the constitutional sense, did not embrace rights of that character, because of the prohibitions of the Eleventh Amendment, which operated upon the whole grant of judicial power, including, of course, such grant as to controversies between States.

The two other cases to which I have referred are *Hans* v. *Louisiana*, (1890) 131 U. S. 1, and *Smith* v. *Reeves*, (1900) 178 U. S. 436. In the first, the opinion of the court was delivered by Mr. Justice Bradley; in the second, by Mr. Justice Harlan. In *Hans* v. *Louisiana*, a suit was brought in the Circuit Court of the United States against the State of Louisiana by a citizen of that State, under the claim that the rights asserted arose under the Constitution and laws of the United States, and therefore were not within the Eleventh Amendment, since that amendment only prohibited suits against a State by a citizen of another State or by aliens. The argument was pressed that as the guarantees of the Constitution were all-abiding, that it would be against public policy to deprive a citizen of the protection of the Constitution of the United States by bringing him within the spirit when he was not within the letter of the Eleventh Amendment. The court answered the contention in the broadest possible way. It held that the effect of the Eleventh Amendment was to qualify to the extent of its prohibitions the whole grant of judicial power, and, therefore, although a suit by a citizen of a State against a State to enforce assumed constitutional rights, was not within the letter of the amendment; it was within its spirit, and there was no jurisdiction in the Federal courts over such controversy. In summing up its general conclusions the court said (p. 21):

"It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence. The legislative department of a State represents its polity and its will; and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent, (of which the legislature, and not the courts, is the judge,) never fails in

the end to incur the odium of the world, and to bring lasting injury upon the State itself. But to deprive the legislature of the power of judging what the honor and safety of the State may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause."

Smith v. *Reeves* was an action brought in the Circuit Court of the United States by a corporation created under an act of Congress, against the treasurer of the State of California, to obtain redress concerning certain taxes. The defendant challenged the jurisdiction upon the ground that in effect the action was one against a State. This court, concluding that the State of California was the real party in interest, was led to consider whether a Federal court was thereby deprived of jurisdiction. The contention on the part of the plaintiff was that as a Federal corporation had a right to invoke, in virtue of the law of its creation, the jurisdiction of the Federal courts, the case was not controlled by the prohibitions of the Eleventh Amendment forbidding suits against a State by citizens of other States or aliens. The court, speaking through Mr. Justice Harlan, again adversely disposed of the contention, saying (p. 446):

"If the Constitution be so interpreted it would follow that any corporation created by Congress may sue a State in a Circuit Court of the United States upon any cause of action, whatever its nature, if the value of the matter in dispute is sufficient to give jurisdiction. We cannot approve this interpretation."

After referring to the views expressed by Hamilton, Madison and Marshall, which were commented upon in *Hans* v. *Louisiana*, the court quoted approvingly the following passage from the opinion in *Hans* v. *Louisiana*:

"It seems to us that these views of those great advocates and defenders of the Constitution were most sensible and just; and they apply equally to the present case as to that then under discussion. The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own State in the Federal courts, whilst the idea of suits by citizens of other States, or of foreign States, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States, can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face."

The opinion concluded as follows (p. 449):

"It could never have been intended to exclude from Federal judicial power suits arising under the Constitution or laws of the United States

when brought against a State by private individuals or State corporations, and at the same time extend such power to suits of like character brought by Federal corporations against a State without its consent."

Here again I am unable to perceive any ground for taking the case in hand out of the rulings made in the cases just reviewed. The letter of the Eleventh Amendment was just as inapplicable to a suit by a citizen of a State against a State to enforce his constitutional rights and to a suit by a Federal corporation, suing in the Federal court by virtue of its creation, as it was to the grant of judicial power over controversies between States. But the prohibition of the Eleventh Amendment was held to apply, because that amendment was again construed as prohibiting the enforcement of claims by private individuals against States through the judicial power of the United States, without reference to the character of the person by whom the claim was asserted. In other words, the decision was that the operation of the Eleventh Amendment was to be determined, not by the formal party complainant on the record, but by the essential character and nature of the claim or right which was asserted. This being the decision, how consistently can the State of South Dakota be held to have power to give effect to a character of claim as to which the Eleventh Amendment declares the judicial power of the United States shall not extend.

Will not the accuracy of what I have just stated, as applied to this case, be demonstrated by putting the question which this court put in *Hans* v. *Louisiana* and approvingly reiterated in *Smith* v. *Reeves*, and giving it the answer which the court gave in those cases, changing, of course, the form of the question to meet the case now here. For this purpose, I repeat the question, placing, however, in brackets the changed mode of expression necessitated by the difference in the character of the parties complainant. "Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued" [upon private claims due to its own citizens or to aliens or citizens of other States, if only such claims were sold or otherwise disposed of long after the debtor State had refused to pay them, so as to thus secure their judicial enforcement] "can we imagine that the Eleventh Amendment would have been adopted by the States? The supposition that it would is almost an absurdity on its face."

Nor do I think the previous decisions of this court, which are relied upon as establishing that the State of South Dakota may maintain this suit, have any such tendency. Of course, it is not by me denied that a dispute as to boundaries between two States is judicially cognizable as a controversy between States, and that such may also be the case where one State asserts property rights against another, provided always that the assertion of the particular right does not violate the prohibitions of the Eleventh Amendment. So, also, in my opinion, *United States* v. *North*

Carolina, (136 U. S. 211,) and *United States* v. *Texas*, (143 U. S. 621,) instead of sustaining the view that the cause of action here asserted can be treated, despite the provisions of the Eleventh Amendment, as a controversy between States, establish the contrary. In *United States* v. *North Carolina*, the United States sued the State of North Carolina concerning the interest on certain bonds. No objection was taken by North Carolina to the jurisdiction of the court, since that State voluntarily assented to a judicial determination of the issue involved. There was, and could have been, therefore, no question of jurisdiction, so far as the State of North Carolina was concerned. The only question of jurisdiction which could have arisen was whether a suit by the United States against a State was within the constitutional grant of judicial power. Although the court in its opinion in *United States* v. *North Carolina* did not refer to the subject of jurisdiction, it must be assumed that it was considered. This is shown by a remark concerning *United States* v. *North Carolina*, made by the court in the course of its opinion in *United States* v. *Texas*, to the following effect:

"It is true that no question was made as to the jurisdiction of this court, and nothing was therefore said in the opinion upon that subject. But it did not escape the attention of the court, and the judgment would not have been rendered except upon the theory that this court has original jurisdiction of a suit by the United States against the State."

Those two cases, therefore, so far as jurisdiction is concerned, simply determined that the grant of judicial power concerning controversies between States, whilst not in letter, embracing a suit brought by the United States against a State, in spirit and purpose did give jurisdiction of a suit of that character. The effect of these rulings, then, was but to cause a suit by the United States against a State to be within the meaning of controversies between States. In other words, in ascertaining the import of the grant of judicial power as to controversies between States, the court gave force to the spirit and purpose of the Constitution in order to include a suit by the United States against a State within the category of controversies between States. This was simply applying the same rule of construction to the grant of judicial power for the purpose of including the United States, which had been previously applied in *Hans* v. *Louisiana*, in *Smith* v. *Reeves*, and in all the other cases to which I have referred, in order to exclude jurisdiction over controversies, to entertain which would have been a violation of the spirit and purpose of the Eleventh Amendment. When *United States* v. *North Carolina* and *United States* v. *Texas* are considered, it seems to me clear that the decision now made not only is destructive of the inherent rights of the States as protected by the Eleventh Amendment, but also strips the government of the United States of its rights as a sovereign belonging to it under the Constitution. As under the decisions referred to a suit between the United States and a

State is within the grant of judicial power over controversies between States, it must follow that a suit by a State against the United States is also of that character. Now, as the ruling is that such a controversy may include the claim of a private individual, if only such claim be transferred to a State, it follows that a suit by a State against the United States on a claim of that character is within the grant of judicial power. Thus it has come to pass that any and every claim against the United States, whatever be its character, is enforceable against the United States if only a State chooses to acquire and prosecute its enforcement. It is no answer to suggest that such claims of private individuals are not justiciable unless the law of the United States has caused them to be so, for if the constitutional grant of judicial power embraces such controversies as is now necessarily held, any restriction by Congress would be repugnant to the Constitution.

My reason does not perceive how the principles which have been stated and the rulings of this court enforcing them are rendered inapplicable by the suggestion that, as the court may not inquire into the motives actuating a particular transfer of right, therefore it is without power to refuse to enforce in behalf of South Dakota the alleged gift. This proceeds upon the assumption that the want of jurisdiction to enforce a private claim against a State depends upon motive. But the absence of such jurisdiction rests upon the constitutional prohibition which addresses itself to the very nature of the cause of action and imposes upon the court the duty to inquire into it. The power of the court when such is the case, even in a case brought in this court by one of the States of the Union to enforce an alleged pecuniary right, is aptly illustrated by *Wisconsin* v. *Pelican Insurance Co.*, (127 U. S. 265.) There the State of Wisconsin, having obtained a judgment against the defendant corporation in the courts of Wisconsin, availed of the original jurisdiction of this court to sue the defendant corporation to enforce the judgment. It was held that, as the judgment was for a penalty imposed by the laws of Wisconsin, and as penalties had no extraterritorial operation, the court would look at the origin of the rights upon which the judgment was based, and, doing so, declined to enforce the judgment. See also *Andrews* v. *Andrews*, (188 U. S. 14.) If, as the result of merely a general rule of law against the extraterritorial operation of statutory penalties, this court looked beyond the judgment sued on by a State to the cause of action merged in the judgment, and refused relief, the court now must have the power to look into the present cause of action and the origin of the rights asserted by the State of South Dakota. To do otherwise seems to me is but to declare that a general principle of law restricting the extraterritorial enforcement of penal statutes must be held to have more sanctity than the declared will of the people of the

United States expressed in the Eleventh Amendment. Indeed, the existence of power in this court to inquire into purpose and motive in suits brought by one State against another State was directly upheld in *New Hampshire* v. *Louisiana* and *New York* v. *Louisiana, supra.* It was not denied in those cases that the bonds sued upon were negotiable, and that if the rules of law controlling in controversies between private individuals were to be applied, the title of each plaintiff State to the bonds it sought recovery upon could not be gainsaid, but should be regarded as absolute. Coming, however, to enforce the provisions of the Eleventh Amendment, the court held that it was its duty to depart from the rule ordinarily applied and to examine into the nature of the asserted rights, and if to give effect thereto would be inconsistent with constitutional provisions, to refuse to lend its aid to the enforcement of the claims.

SECOND. But putting out of view what seems to be the controlling principles previously stated, let me now look at the controversy from a narrower point of view and consider the rights of the parties by those considerations which would apply to the enforcement of private rights. It is unquestioned on the record that the bonds given to the State of South Dakota and upon which its action is based were past due at the time of the gift, and that for more than twenty years prior to the gift the State of North Carolina had, by her legislation, held herself not bound to pay the same. That these facts were known to the State of South Dakota when it accepted the gift is shown. The makers of the gift could not transfer to the State of South Dakota rights which they had not. In other words, if when the gift was made that which was parted with was not susceptible and had never been susceptible of legal enforcement because not embodying a justiciable obligation against the State of North Carolina, the State of South Dakota could not, by the acceptance of the gift, acquire greater rights than were possessed by the transferrer. I take it to be the elementary rule of public law that, whilst the contracts of a sovereign may engender natural or moral obligations, and are in one sense property, they are yet obligations resting on the promise of the sovereign and possessing no other sanction than the good faith and honor of the sovereign itself. These principles, as applied to the States of this Union, are the necessary resultant of the adoption of the Eleventh Amendment. It is not necessary to refer to opinions of publicists on the general subject, since this court—as to the States of the Union—has declared the doctrine so fully as to leave it no longer an open question in this forum.

The concluding passages already quoted from the opinion in *Hans* v. *Louisiana, supra,* approvingly referred to in *Smith* v. *Reeves,* state the subject in the clearest possible way. Prior to the cases just mentioned, however, this court in numerous decisions had announced the same doctrine.

A few of the more important of those cases will now be briefly noticed. In *In re Ayers*, (1887) 123 U. S. 443, the court, speaking, through Mr. Justice Matthews, said (p. 504):

"It cannot be doubted that the Eleventh Amendment to the Constitution operates to create an important distinction between contracts of a State with individuals and contracts between individual parties. In the case of contracts between individuals, the remedies for their enforcement or breach, in existence at the time they were entered into, are a part of the agreement itself, and constitute a substantial part of its obligation. (*Louisiana* v. *New Orleans*, 102 U. S. 203.) That obligation, by virtue of the provision of article I, sec. 10, of the Constitution of the United States, cannot be impaired by any subsequent State legislation. Thus, not only the covenants and conditions of the contract are preserved, but also the substance of the original remedies for its enforcement. It is different with contracts between individuals and a State. In respect to these, by virtue of the Eleventh Amendment to the Constitution, there being no remedy by a suit against the State, the contract is substantially without sanction, except that which arises out of the honor and good faith of the State itself, and these are not subject to coercion. Although the State may, at the inception of the contract, have consented as one of its conditions to subject itself to suit, it may subsequently withdraw that consent and resume its original immunity, without any violation of the obligation of its contract in the constitutional sense. (*Beers* v. *Arkansas*, 20 How. 527; *Railroad Co.* v. *Tennessee*, 101 U. S. 337.) The very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the Eleventh Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose."

There is another and allied reason which seems to me equally decisive against this claim. As will be observed from the passage already quoted from the opinion of this court in *In re Ayers*, *supra*, it was there affirmatively declared that as the obligation of a State rested but on its conceptions of moral duty, the State itself, under the great responsibilities which attach to it as a sovereign, was the ultimate tribunal to whom the creditor agreed at the very inception of the contract to submit his rights. And that where a sovereign State, in the discharge of the public duty thus resting upon it, declared against the payment of an obligation, such conclusion by the sovereign was a determination by the tribunal which had been impliedly agreed on and

was binding upon the creditor, and, as a result of the Eleventh Amendment, not susceptible of review or change by the courts of the United States. Applying this doctrine to this case it is apparent that years before the transfer of the bonds to the State of South Dakota, the State of North Carolina had, through its duly constituted authorities, determined that the holder of the bonds in question had not the right now asserted by the State of South Dakota under the transfer from such creditor. This after all only serves additionally to demonstrate the fallacy underlying the assumption that the State of South Dakota, because it is a State and may avail of the grant of judicial power over controversies between States, can in doing so escape the prohibition of the Eleventh Amendment, created for the very purpose of protecting the States and preserving their independent control over their own affairs. It seems to me the gross inequality which must arise from disregarding the judgment of the tribunal selected by the creditor is well illustrated by this case. When the facts which I have at the outset stated are recalled, it will be observed that there were about two and a half millions of dollars of outstanding bonds of the same series as those now owned by the State of South Dakota, and that that amount was reduced to about two hundred and fifty thousand dollars of principal, as a consequence of the conclusion of the State of North Carolina concerning the exigencies of its financial situation. It is also certain, when the facts stated in the petition presented to the legislature of North Carolina by the assignor of the State of South Dakota are recalled, that but for this vast reduction of the debt produced by the determination of the State of North Carolina, the alleged security now sought to be realized upon by the State of South Dakota would be of no value. The moral attitude shown by the record then is this, that the State of South Dakota, as the mere beneficiary of the bounty of an individual, seeks to derive all the benefit resulting from the judgment of the State of North Carolina as to its public debt and at the same time desires to repudiate that judgment, and to obtain rights which never would have been within its reach if the judgment of the State of North Carolina had not been exercised. Under these circumstances it to me seems, even if a court of equity was vested with power to disregard the final judgment of the tribunal selected at the time the bonds were issued, such court should not exercise that power in favor of one standing on the record in the position which the State of South Dakota here occupies.

Looking at the question from a yet narrower point of view, the same conclusion seems to me to be impelled. In *United States* v. *Buford*, (1830) 3 Pet. 11, the question was considered whether a claim acquired by the government of the United States from an individual, which was barred by limitation at the time of its acquisition by the United States, was yet

enforceable in the hands of the government. The court decided that, as against the United States, under such circumstances, despite the general exemption of the government from the operation of such statute, the bar of the statute was operative. The court said (p. 30):

"It can require no argument to show that the transfer of any claim to the United States cannot give to it any greater validity than it possessed in the hands of the assignor."

And this principle was applied by the Court of Exchequer in *King* v. *Morrall*, (6 Price, 24,) cited approvingly in *United States* v. *Nashville &c. R. Co.*, (118 U. S. 125.) The facts of the case were, in brief, as follows: On a *scire facias* it was sought by the crown to recover from a creditor of a debtor to the crown the amount of a certain bill of exchange. On demurrer to a plea of the statute of limitations it was contended that the right of the crown was not barred by the statute—by a plea which in point of fact admitted the debt. The court held otherwise. Lord Chief Baron Richards observed (p. 28):

"The crown is only entitled to its debtor's right, and cannot create or revive any right in the person of its debtor, if none ever existed, or it has become extinct. In this case, nothing could have been recovered by the debtor of the crown against this defendant if the statute had been pleaded; I therefore consider that it is also a good bar to the suit of the crown, who stands precisely in the same situation as its debtor, and that this is an honest plea, which, therefore, the law allows. If the crown could thus put its debtor in a better situation than he was in before, by such a proceeding as this, the consequence would be monstrous before the passing of the late statute, and the mischief would have been incalculable."

Wood, Baron, said (p. 29):

"In this case, the claim of the crown is only a derivative right, and it must, therefore, stand in the same situation as its principal."

Garrow, Baron, remarked (p. 31):

"By a process, said, by a fiction, to be for the benefit of the crown, it is attempted to revive the debt, and place the creditor in a better situation than the law permits. This is too gross an absurdity; . . ."

These authorities additionally demonstrate that a claim which, when acquired by the State of South Dakota, was without legal sanction, did not by the mere fact of such acquisition become a justiciable, enforceable right. It may be said that there was no statute of limitations in the State of North Carolina barring the claim. But this begs the whole question. It assumes that the State of North Carolina should have indulged in the idle ceremony of passing a special statute of limitations extinguishing, after the lapse of a certain time, a cause of action which had never existed. The proposition is but a further illustration of the misconception which

results from holding that the claim of an individual against a State which is not enforceable can be made such by the voluntary act of transferring. The very attribute of sovereignty renders it unnecessary for the sovereign to legislate for its own behalf in the passage of statutes of limitations, insolvent and other like laws, as his will, controlled alone by the duty and sense of responsibility which sovereignty must be presumed to engender, determines the question of liability.

But let me analyze the proposition in order to see what it leads to. What is a statute of limitations? It is but the action of the State in determining that, after the lapse of a specified time, a claim shall not be legally enforceable. In this case, from the very inception of the alleged obligation to the time of the transfer to the State of South Dakota, there was no legal cause of action for the enforcement of the claim under the laws of North Carolina, and by the obligation of the Eleventh Amendment no cause of action on the subject could be asserted to exist in any court of the United States. To hold that there is a right to recover in this case which would not exist if there had been a statute of limitations barring the cause of action, although none had ever arisen, is but to say that the right of the parties is to be determined by words having no significance whatever. The fact that the State of North Carolina, in her own courts, was not subject to be coerced as to the claim in question, was in effect a State statute of limitations, since the act of the State in forbidding the arising of a cause of action is certainly in reason the equivalent of an act of that State barring a cause of action in a case where one could exist. It is the non-existence of the cause of action at the time of the transfer, upon which rests the rule preventing a sovereign from recovering on a claim which was barred at the time he acquired it. This is true also of the Eleventh Amendment. As that amendment from the date of the inception of the alleged contract prohibited the assertion of any cause of action concerning the same in the courts of the United States, the amendment was substantially a national statute of limitations. Thus operating, it furnishes an effectual barrier, preventing the State of South Dakota from asserting in the courts of the United States that it had acquired from its transferrer a cause of action which the Constitution of the United States prevented from ever existing so far as the judicial power of the United States was concerned.

Nor does the fact that the State of South Dakota alleges there was a pledge or mortgage of certain stock in the North Carolina Railroad serve at all to take the case out of the control of the provisions of the Eleventh Amendment. It is not pretended that any delivery of stock alleged to have been pledged was ever made to the bondholders; on the contrary, it is conceded that the stock in question has always been in the possession of

the State of North Carolina. The right to enforce the alleged pledge must therefore rest upon the power to enforce a private claim against the State of North Carolina and to take from its possession property of which it has ever had the absolute dominion and control. And this view is to my mind concluded by the previous rulings of this court, one of which I shall now particularly notice.

Christian v. *Atlantic & North Carolina Railroad*, (1890) 133 U. S. 233, was a bill in equity to reach dividends on the stock of the railroad company, and apply such dividends to the payment of bonds issued by the State of North Carolina, and for a sale of stock owned and held by the State. It was contended by the defendants that the proceeding was in substance against the State, and therefore within the prohibitions of the Eleventh Amendment. The correctness of this contention was denied, on the ground that there was a valid contract in favor of the complainant; that by that contract there was a pledge in its favor; and that the object of the suit was not to hold the State of North Carolina or to sue it, but to proceed *in rem* against the stock to enforce the right in and to it resulting from the contract. The court—not at all disputing that if the premise was correct the legal conclusion based on it was well founded—proceeded to test the accuracy of the premise. It found that the stock in question had never been actually delivered to the alleged pledgee, but had always remained in the possession of the agents of the State. Reaching this conclusion, it was held that there was no pledge unless such contract resulted from the declaration of the State that the stock held by it was pledged. Coming to consider that question, the court, speaking through Mr. Justice Bradley, said (p. 242):

"It was no more of a pledge than is made by a farmer when he pledges his growing crop or his stock of cattle for the payment of a debt, without any delivery thereof. He does not use the word in its technical, but in its popular sense. His language may amount to a parol mortgage, if such a mortgage can be created; but that is all. So in this case, the pledge given by the State in a statute may have amounted to a mortgage, but it could amount to nothing more; and if a mortgage, it did not place the mortgagee in possession, but gave him merely a naked right to have the property appropriated and applied to the payment of his debt. But how is that right to be asserted? If the mortgagor be a private person, the mortgagee may cite him into court and have a decree for the foreclosure and sale of the property. The mortgagor, or his assignee, would be a necessary party in such a proceeding. Even when absent, beyond the reach of process, he must still be made a party and at least constructively cited by publication or otherwise. This is established by the authorities before referred to, and many more might be cited to the same effect. The proceeding is a suit against the party to obtain, by decree of court, the benefit of the mortgage right. But where the mortgagor in possession is a sovereign State, no such

proceeding can be maintained. The mortgagee's right against the State may be just as good and valid, in a moral point of view, as if it were against an individual. But the State cannot be brought into court or sued by a private party without its consent. It was first held by this court that, under the Constitution of the United States, a State might be sued in it by a citizen of another State, or of a foreign State; but it was declared by the Eleventh Amendment that the judicial power of the United States shall not be construed to extend to such suits. (*New Hampshire* v. *Louisiana*, 108 U. S. 76; *Louisiana* v. *Jumel*, 107 U. S. 711; *Parsons* v. *Marye*, 114 U. S. 325; *Hagood* v. *Southern*, 117 U. S. 52; *In re Ayers*, 123 U. S. 443.)"

Applying the ruling made in the case just cited to the case in hand, it to me clearly results that as possession of the alleged pledged or mortgaged stock was never parted with by the State of North Carolina, the right asserted by the State of South Dakota to enforce the alleged pledge comes directly within the prohibition of the Eleventh Amendment, since in its essence it depends upon the existence in this court of the power to enforce against the State of North Carolina in favor of the State of South Dakota, a mere promise made by North Carolina to a private individual, as to which the State of South Dakota acquired no greater right than was possessed by the individual who made the transfer to it of the bonds in question.

THIRD. Finally, putting out of view the various considerations which I have previously stated, in my opinion this record discloses a condition of things which ought to prevent a court of equity from exerting its powers to enforce for the benefit of the State of South Dakota the claim which it asserts against the State of North Carolina. From the facts which I have at the outset recited it is undeniable that at the time the gift was made to the State of South Dakota of the bonds in question they were past due and payment thereof had been more than twenty years prior to the gift been refused by the State of North Carolina. The letter evidencing the gift demonstrates that the purpose of the gift to the State of South Dakota, was to enable that State to assert a cause of action against the State of North Carolina which did not exist in favor of the transferrer. It also appears by the act of the legislature of South Dakota, under which this suit was brought, that the State of South Dakota deemed that it might acquire a mere right to litigate, since the act itself in advance provided that the attorney general of the State should prosecute actions in the name of the State to recover on bonds or choses in action which might be transferred to the State, and that it contemplated litigation without cost to itself, since the act empowered the attorney general to employ counsel to prosecute suits, the compensation to be paid *out of the proceeds which might be realized*. This condition of things, in my opinion, although

it may not be champertous in the strict sense of that word, is in its nature equivalent to a champertous engagement, whose enforcement is contrary to public policy, and one which a court therefore ought not to lend its aid to carry into effect. It has been sometimes said that the doctrine of maintenance and champerty has no application to the sovereign. But this can alone be justified by taking into view the high attributes which pertain to sovereignty. Now if the State of South Dakota may avail of the delegation of judicial power over controversies between States—a power conferred in view of the sovereign dignity of all the States—for the purpose of destroying the sovereignty of another State by subjecting such State to judicial coercion concerning a claim of a private individual, then it seems to me the State of South Dakota should be treated as any other private individual seeking to enforce a private claim, and should have applied to it by a court of equity the principles of morality and justice which control such courts in refusing aid to persons who acquire merely litigious and speculative claims. As said by this court, in the course of its opinion in *Randolph* v. *Quidnick Co.*, (1890) 135 U. S. 457: "It is a case where equity, true to its ideas of substantial justice, refuses to be bound by the letter of legal procedure, or to lend its aid to a mere speculative purchase which threatens injury and wrong to a large body of honest creditors, who have trusted for the payment of their debts to the legal validity of proceedings theretofore taken." How aptly these observations apply to the case in hand is shown when it is considered that the holders of more than two million dollars of bonds of the same class as that held by the State of South Dakota, more than twenty years before the transfer to that State, accepted, on the faith of the operation of the Eleventh Amendment, and the circumstances surrounding the State of North Carolina at the time, the adjustment proposed by the act of 1879; and therefore that the claim of South Dakota now urged, in effect, as I have previously stated, seeks to avail of the result brought about by the operation of the Eleventh Amendment, and yet at the same time to deny its efficacy as regards the rights which it claims. It is additionally shown by the inference arising from the record that the whole fiscal system of the State of North Carolina in existence since the adjustment of 1879 has rested upon the action taken by the creditors of the State consequent upon their reliance upon the possession by the State of the attributes of sovereignty which it was the purpose of the Eleventh Amendment to consecrate.

But eliminating all the previous reasoning and considering the case upon the hypothesis that the controversy is one between States, nevertheless I am of opinion that the court is without jurisdiction. And the statement of the reasons which impel me to this conclusion involves an examination of the second proposition which was by me at the outset stated, that is—

(B.)

The want of power to render the decree which is now directed to be entered, because of the absence of essential parties whose presence would oust jurisdiction and the impotency to grant any relief whatever in the absence of such parties.

Even under the view that the general conclusions of the court as to its authority over the controversy as one between States is well founded, I cannot agree that the holders of the bonds issued in aid of the North Carolina Railroad are not essential parties to this controversy, since the nature of the relief specifically prayed necessitates their presence, and since, without such presence, in my opinion, no decree giving substantial relief to the complainant or doing justice to the principal defendant, can be rendered. If they are such essential parties, it is not questioned that the court is without jurisdiction. (*California* v. *Southern Pacific Company*, 157 U. S. 229.)

Under the assumption that there was a valid mortgage in favor of the complainant and other holders of the same class of bonds, the bill proceeds upon the theory that it is essential that it be determined what claim or right the holders of the bonds issued in aid of the North Carolina Railroad have upon or in the stock in question. To that end the bill challenged the existence of any right of pledge in favor of such bondholders, upon the theory that, as against the holders of bonds issued in aid of the Western North Carolina Railroad, they had lost their right by accepting the compromise of 1879. It is, however, further asserted in the bill that even if the holders of the bonds issued in aid of the North Carolina Railroad had not, by accepting the compromise of 1879, lost their rights as to the complainant and those similarly situated, yet as the pledge was past due when the adjustment of 1879 was entered into, it was essential, to afford the complainant relief as a junior secured creditor on the stock, that the entire stock be sold free from all encumbrances. And this was also the position taken by the answer filed on behalf of the representative of the outstanding bonds issued in aid of the Western North Carolina Railroad. The bill, then, having been framed upon the theory of the necessity of the specific relief referred to, which could not be afforded without the presence of the other lienholders, the cause, it seems to me, ought not now to be decided upon a wholly different theory, and relief, inconsistent with that specifically prayed for, be awarded to the complainant upon that changed basis.

But, leaving out of view the considerations just stated, it seems to me the decree which it is proposed to enter cannot afford any specific relief to the complainant, without destroying or materially impairing the rights of the prior lienholders, although they are now held not to be essential parties

to the controversy. The pledge in favor of the holders of the bonds issued in aid of the North Carolina Railroad was of all the stock and for the benefit of all the bonds. It was therefore indivisible. It cannot be divided without impairing the obligations of the contract in favor of those creditors. Now, whilst each of the ten mortgages which it is in effect held the complainant possesses purported to be of ten shares of stock securing each bond, no particular ten shares were delivered, segregated or identified. As a result no division of the stock held by the State had in fact ever been made, and, therefore, each and every one of the ten shares assumed to be mortgaged to secure each of the bonds were subject to the prior lien on all the stock in favor of all the holders of bonds issued in aid of the North Carolina Railroad. When the attempt is made to enforce the decree in this case what shares will be sold? If any particular shares, then, unless the rights of the prior lienholders are to be rendered divisible, although they are indivisible, the shares sold must continue to be subject to the entire pledge in favor of all the bonds issued in aid of the North Carolina Railroad. To state this situation, it seems to me, is to demonstrate that the decree will afford no substantial relief whatever. The best that can be said, under such circumstances, is that the effect of a sale so made will be merely to foment a law suit. A court of equity, when its aid is invoked to give particular relief, if it finds that it is unable to do it, ought not, whilst denying such relief, to enter a decree which confers no substantial relief, but, on the contrary, can only serve as a fruitful source of future litigation, injurious to the rights of the very party or class of persons in whose favor the decree is rendered. But this is not all, for whilst the decree will, in substance, deprive the complainant of any real benefit from his assumed security, a sale under the decree must also result injuriously to the State of North Carolina. Its rights, as well as those of the complainant, are entitled to consideration. The possibility of a deficiency decree is now taken into account in the opinion and rights on that subject are reserved. But if the sale which is to be ordered is one which must lead to a prejudicial result, then the effect of the decree is simply to order a sale which can produce at best no more than a nominal sum, and will lay a foundation for a deficiency decree for an amount wholly out of proportion to the actual value of the mortgaged property. It is to my mind no answer to point out that whilst there was no segregation and delivery of the ten shares of stock mortgaged to secure each bond, as such division was provided for, a a court of equity will treat that as being done which should have been done. The fallacy of this lies in failing to consider the rights of the prior lienholders and overlooking the fact that their lien was indivisible, and that the segregation provided for in the act of 1866 could not be made without being subordinate to the entire sum of the prior and indivisible right of

pledge. When this is borne in mind it results that the rights of those prior lienholders are necessarily clouded or impaired by decreeing that a court of equity will treat that as having been done which ought to have been done; when the very question is, could it have been done efficaciously, consistently with the rights of the prior lienholders? They are, therefore, I submit, essential parties, if it is proposed to give any real relief by the decree of sale which is ordered. If it is not proposed to give that character of relief, then such a decree ought not to be entered, especially when it does not accord with and in reality is inconsistent with the specific relief asked for.

I am authorized to say that the CHIEF JUSTICE, Mr. Justice MCKENNA and Mr. Justice DAY concur in this dissent.

True copy.

Test:

Clerk Supreme Court, U. S.